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IN THE SUPREME COURT OF THE STATE OF OHIO

Cause No. 29199

(142 O. S. 6)

THE FIRST NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

Plaintiff-Appellee,

vs.

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO,

Defendants-Appellants.

STATEMENT OF JURISDICTION UPON APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

Pursuant to the provisions of Rule No. 12 of the Supreme Court of the United States (1941), the above-named Plaintiff-Appellee in the Supreme Court of the State of Ohio, now Appellant to the Supreme Court of the United States and hereafter designated as Appellant, files this, its separate statement, particularly disclosing the basis upon which it is contended the Supreme Court of the

United States has jurisdiction upon appeal to review the Judgment of reversal appealed from herein, as follows:

A.

Basis Upon Which It Is Contended That the Supreme Court Has Jurisdiction.

The Supreme Court of the United States has jurisdiction in this case because there is drawn in question in it the validity of certain Statutes of the State of Ohio, to-wit: Section 5408 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition) and Sections 5672 and 5673 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91) on the ground of their repugnance, as construed in this suit by the Supreme Court of Ohio, which is the highest Court of that state in which a decision in this suit could be had, to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to Section 5219 of the Revised Statutes of the United States (Section 548 of Title 12 of the United States Code) as construed by the Supreme Court of the United States in many cases but notably in the case of *Owensboro National Bank* vs. *Owensboro* (1899), 173 U. S. 664, 43 Law. Ed. 850, and the case of *First National Bank of Gulfport, Mississippi,* vs. *Adams, Revenue Agent,* (1922), 258 U. S. 362, 66 Law. Ed. 661, 42 S. Ct. 323, in this, that:

1. The Supreme Court of Ohio erred in holding, in effect, that Section 5408 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition) authorizes the County Auditor to list and assess taxes on the County Auditor's Tax Lists and the County Treasurer's Tax Duplicates, in

the name of and against The First National Bank of St. Clairsville, Ohio (Plaintiff-Appellee in the Supreme Court of Ohio and Appellant in the Supreme Court of the United States) and that the same constitutes a valid assessment of taxes against the individual shareholders on the shares of the capital stock of the Bank held by them;

2. Said Court erred in holding, in effect, that Section 5408 of the General Code of Ohio, supra, authorizes the County Auditor to list and assess taxes on the County Auditor's Tax Lists and the County Treasurer's Tax Duplicates in the name of and against The First National Bank of St. Clairsville, Ohio, on the net capital, surplus and undivided profits of the Bank, excluding real estate, in solido, or in a lump sum, and that the same constitutes valid taxes on the shares of the shareholders of the capital stock of the Bank;

3. Said Court erred in holding, in effect, that Section 5672 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91) authorizes a penalty, against the said The First National Bank, in the gross amount of the taxes assessed by the County Auditor on the Auditor's Tax Lists and the Treasurer's Tax Duplicates, in solido, or in a lump sum, in the name of and against the said Bank on the net capital, surplus and undivided profits of the Bank, excluding real estate, for failure of the Bank to collect from its individual shareholders undetermined sums, sufficient to equal the amount of said assessment in solido against the Bank, and to pay the same to the County Treasurer;

4. Said Court erred in holding, in effect, that the said The First National Bank is required, under such

an assessment of taxes in solido, to compute the amount of the taxes due from each shareholder, and then to collect the same and pay the amount thereof to the County Treasurer, although nothing contained in the Statutes of the State of Ohio—Sections 5408 to 5414, inclusive, of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition), and Sections 5672 and 5673 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91), or any other statute or law of Ohio—imposes such a duty on the Bank;

5. Said Court erred in holding, in effect, that Section 5672 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91) makes a tax so listed and assessed a lien on the shares of the shareholders of the capital stock of the Bank until the same is paid;

6. Said Court erred in holding, in effect, that the liability of the said Bank, under Section 5672 of the General Code of Ohio, 1930 Edition, supra, to compute, collect and pay to the County Treasurer the taxes, from its individual shareholders, exists, even though the County Auditor has listed and assessed the same in solido, or in a lump sum, against the Bank, and has not apportioned, on the Auditor's Tax Lists and Treasurer's Tax Duplicates, and assessed to the individual shareholders of the Bank the respective amounts of taxes due from each;

7. Said Court erred in holding, in effect, that the taxes listed and assessed in the name of and against the said The First National Bank on the net capital, surplus and undivided profits of the Bank, excluding

real estate, is, under the provisions of Section 5672 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91), a lien on the shares of the capital stock of the Bank belonging to the individual shareholders until the same is paid, and that such assessment imposes a duty on the Bank to determine the amount of taxes due from each individual shareholder and collect the same from each shareholder until it has collected the total amount assessed against the Bank, and then pay the same to the Treasurer of the County in which the Bank is located, and that such assessment imposes a liability, by way of penalty, for the gross amount of such taxes, upon the Bank for its failure to collect and pay said taxes;

8. Said Court erred in holding that:

"The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a (national) bank to collect the taxes due upon its shares of stock and pay the same to the treasurer of the county by the provisions of Section 5672, General Code of Ohio";

9. Said Court erred in holding, in effect, that the said Statutes of Ohio authorized the taxes so assessed and in question in this case, as valid taxes on the shares of the shareholders and thus imposed the obligation to pay the total amount of said taxes upon said Petitioner, by way of penalty, for failure to collect, and pay taxes so assessed, from its shareholders before the same became delinquent;

10. The privilege and immunity from the taxes in question in this case, as the same were assessed against

Petitioner by the County Auditor on the County Auditor's Tax Lists and the Treasurer's Tax Duplicates, were specially set up and claimed by Petitioner in all of the State Courts, under Section 1 of the Fourteenth Amendment to the Constitution of the United States and under Section 5219 of the Revised Statutes of the United States and under previous unreversed decisions of the Supreme Court of the United States, in the pleadings, in written and printed briefs and in oral arguments, and the Supreme Court of Ohio erred in refusing to sustain said privilege and immunity so claimed;

11. In reversing the Judgment of the Court of Appeals of Belmont County, Ohio, with respect to the invalidity of the taxes in question in this case.

The decision of the Supreme Court of Ohio in this suit was in favor of the validity of such Statutes of Ohio, as so construed.

B.

Statutory Provision Believed to Sustain Jurisdiction.

The Statutory provision believed to sustain the appellate jurisdiction of the Supreme Court of the United States is Section 237(a) and (b) of the Judicial Code, as amended (Title 28, United States Code, Section 344 (a) and (b)), reading, to the extent relevant here, as follows:

"Section 237 (a). A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had * * *; or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal * * *.

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution * * * or laws of the United States; or where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any * * * statute of * * * the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on appeal in a case where such right is conferred by the preceding paragraph; nor shall the fact that a review on appeal might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph."

C.

Statutes of the State, the Validity of Which Is Involved.

The Statutes of the State whose validity, as construed, is involved, are as follows:

G. C., Section 5408 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Shares or Capital of Banks, Incorporated or Unincorporated. All the shares of the stockholders in an incorporated bank or banking association, located in this state, incorporated or organized under the laws of the state or of the United States, and all the shares of the stockholders in an unincorporated bank, located in this state, the capital stock of which is divided into shares held by the owners of such banks and the capital employed, or the property representing it, in an unin-

corporated bank the capital stock of which is not divided into shares, located in this state, shall be listed at the true value in money, and taxed only in the city, ward, or village where such bank is located."

G. C., Section 5409 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Tax on Real Estate of Bank. The real estate of a bank or banking association shall be taxed in the place where it is located in like manner as the real estate of persons is taxed."

G. C., Section 5410 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Names of Stockholders and Shares of Each. There shall be kept in the office at all times where the business of such bank or banking association is transacted, a full and correct list of the names and residences of the stockholders therein, and the number of shares held by each, which at all times during business hours shall be open to the inspection of all officers who are or may be authorized to list or assess the value of such shares for taxation."

G. C., Section 5411 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Return Made by Cashier, etc., to Auditor. The cashier of each incorporated bank, and the cashier, manager or owner of each unincorporated bank, shall return to the auditor of the county in which such bank is located, between the first and second Mondays of May, annually, a report in duplicate under oath, exhibiting in detail, and under appropriate heads, the resources and liabilities of such bank at the close of business on the Wednesday next preceding the said second Monday, with a full statement of the names and residences of the stockholders therein, the number of shares held by each, and the par value of each share, and of the amount of capital employed by unincorporated banks, not divided into shares, and the name, residence and proportional interest of each owner of such bank."

G. C., Section 5412 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Auditor

to Fix Value of Bank Shares or Property. Upon receiving such report the county auditor shall fix the total value of the shares of such banks, and the value of the property representing the capital employed by unincorporated banks, the capital stock of which is not divided into shares, each according to their true value in money, and deduct from the aggregate sum so found, of each, the value of the real estate included in the statement of resources as it stands on the duplicate. Thereupon he shall make and transmit to the annual state board of equalization for banks a copy of the report so made by the cashier, manager or owner with the valuation of such shares or property representing capital employed as so fixed by the auditor."

G. C., Section 5413 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "When Bank Fails to Make Return. If a bank fails to make and furnish to the county auditor the statement required, within the time herein fixed, the auditor shall examine the books of the bank; and also any officer or agent thereof under oath, with such other persons as he deems proper, and make such statement. The auditor shall have like powers, and the probate judge of the county shall exercise like powers and perform like duties in aid of the auditor in the performance of his duties under this section, as are authorized by law in cases where the county auditor is informed, or has reason to believe, that any person has failed to make a return, or has made a false return for taxation. The statement so made out by the auditor shall stand as the statement required to be made by the cashier."

G. C., Section 5414 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition): "Penalty for Making False Return. A bank officer who fails to make out and furnish to the county auditor the return required by section fifty-four hundred and eleven, or wilfully makes a false statement in such return, shall forfeit not more than one hundred dollars together with the costs and other expenses incurred by the auditor or other proper officer in obtaining such statement."

G. C., Section 5672 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91): "Tax a Lien upon Bank Shares; Collection of Tax; Penalty. Taxes assessed on shares of stock, or the value thereof, of a bank or banking association shall be a lien on such shares from the first Monday of May in each year until they are paid. It shall be the duty of every bank or banking association to collect the taxes due upon its shares of stock from the several owners of such shares, and to pay the same to the treasurer of the county in which such bank or banking association is located, as other taxes are paid, and any bank or banking association failing to pay the said taxes as herein provided, shall be liable by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock, and for an additional amount of one hundred dollars for every day of delay in the payment of said taxes."

G. C., Section 5673 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91): "Banks May Deduct Taxes Paid from Shareholders; When; Lien. Such bank or banking association paying to the treasurer of the county in which it is located, the taxes assessed upon its shares, in the hands of its shareholders respectively, as provided in the next preceding section, may deduct the amount thereof from dividends that are due or thereafter become due on such shares, and shall have a lien upon the shares of stock, and on all funds in its possession belonging to such shareholders, or which may at any time come into its possession, for reimbursement of the taxes so paid on account of the several shareholders, with legal interest and such lien may be enforced in any appropriate manner."

Said Statutes have been construed by the Supreme Court of the State of Ohio in this suit to authorize the listing and assessment of personal property taxes by the County Auditor on the Auditor's Tax Lists and the Treasurer's Tax Duplicates, in the name of and against Appellant, which is

a National Bank, on the net capital, surplus and undivided profits of the Bank, excluding real estate, in solido, as valid taxes on the shares of the capital stock of the Bank belonging to the shareholders, and as constituting a lien on such shares until paid, and as imposing a liability on the Bank to collect undetermined amounts from its shareholders to the amount thereof and pay the same to the County Treasurer, and as authorizing the County Treasurer to collect the amount of said taxes from the Bank, when the same become delinquent, as a penal liability of the Bank.

D.

Date of Judgment and Date of Application for Appeal.

The date of the Judgment of the Supreme Court of Ohio sought to be reviewed herein is June 30, 1943, and the date upon which the Application for Appeal was presented and the Appeal allowed was September 18, 1943. Under the provisions of Section 350 of Title 28 of the United States Code, the Appellant may bring its appeal within three months after the entry of the Judgment of the Supreme Court of Ohio.

E.

Nature of the Case and Rulings of the Court Bringing the Case Within the Jurisdictional Provisions Relied Upon.

This suit is a consolidation of three suits filed in the Common Pleas Court of Belmont County, Ohio, on July 27, 1929, February 18, 1930, and January 8, 1931, and numbered 31258 (R., page 212), 31805 (R., page 216) and 32733 (R., page 221), respectively, and consolidated by that Court by its order of April 8, 1935, (R., page 27), each of which cases was brought by Appellant, a National Bank, against the incumbent County Treasurer and County Auditor of that

County, as such, to enjoin them in a First Cause of Action from collecting certain taxes listed and assessed by the County Auditor on the Auditor's Tax Lists and the Treasurer's Tax Duplicates for the years 1928, 1929 and 1930, respectively, in the name of and against Appellant, a National Bank, in solido, or in a lump sum, based on the net capital, surplus and undivided profits of the Bank, excluding real estate, and asking that such taxes be declared void for the following reasons: That there was no Statute of Ohio nor of the United States authorizing or permitting the Auditor to make said assessments of taxes against the Appellant and that the same were contrary to and in violation of Section 5219 of the Revised Statutes of the United States (Section 548 of Title 12 of the United States Code) and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and also in violation of Section 2 of Article 12 of the Constitution of Ohio in effect prior to January 1, 1931, and claiming that said taxes, as so assessed, were discriminatory because assessed at a greater rate than was assessed upon other monied capital coming into actual and direct competition in substantial amounts with Appellant's business. No evidence was introduced by Appellant in support of its claim that said taxes were discriminatory and that claim is not an issue in this case.

In a Second Cause of Action Appellant sought the recovery of similarly assessed taxes paid by it under protest for the years 1926 and 1927, but the Court of Appeals of Belmont County, Ohio, rendered a Judgment against the said Bank on that Cause of Action and the Bank did not appeal therefrom and the same is, therefore, not before this Court. (R., page 52)

By order of the Common Pleas Court, dated May 10, 1939, the present County Treasurer of Belmont County, Ohio, Homer J. Findley, was substituted as party defendant in

each of said causes for his predecessors in office; and E. E. Taylor, present County Auditor of Belmont County, Ohio, was substituted as party defendant in each of said causes for his predecessors in office. (R., page 29)

After the cause was heard in the Common Pleas Court, it was taken to and heard on appeal by the Court of Appeals of Belmont County, Ohio, which Court found in favor of the Bank, (Plaintiff-Appellee in the Supreme Court of Ohio, Appellant in the Supreme Court of the United States) and against Defendants-Appellants in the Supreme Court of Ohio (Appellees in the Supreme Court of the United States), finding that said Bank was a corporation organized under the National Banking Laws of the United States of America and was, at all times, doing a general banking business in the Village of St. Clairsville, Belmont County, Ohio; that said Homer J. Findley is now the Treasurer of Belmont County, Ohio, and E. E. Taylor is now the Auditor of Belmont County, Ohio; that the cashier of the Bank and the Bank itself complied with all the provisions of the Ohio Statutes relative to the taxation of its shares; that the Auditor of Belmont County, Ohio, assessed taxes against the said The First National Bank upon the amounts of its capital, surplus and undivided profits, excluding real estate,

For the year 1928 in the sum of $7,152.56
For the year 1929 in the sum of $7,432.02
For the year 1930 in the sum of $7,784.02

and placed the same against said Bank upon the Auditor's Tax Lists and the Treasurer's Tax Duplicates for said years and transmitted the same to the Treasurer for collection from the Bank, but said Auditor did not, at any time, list or assess against the owners of the shares of capital stock of Appellant, for any of said years, a tax or taxes upon their shares in any amount whatsoever, and did not place on said

Tax Lists or Tax Duplicates for said years the values of the shares of the capital stock of Appellant in the names of the respective owners of such shares; and that said Auditor assessed a penalty against the Bank, when said taxes became delinquent in each of said years, of 10 per cent of the amount of said taxes and added the same to the Auditor's Tax Lists and the Treasurer's Tax Duplicates in the name of and against the Bank and, thereafter, filed the same in the office of the Recorder of Belmont County, Ohio, for and thereby obtained liens against the real estate of the Bank; that said County Auditor and County Treasurer will, unless restrained by order of Court, take legal action against the Bank to collect such taxes and penalties; and that the Bank will suffer irreparable injury thereby; and that said assessments of taxes and penalties against the Bank, and the threatened collection thereof from the Bank are contrary to law and said taxes and penalties are illegal and void and the lien on the Bank's real estate is also illegal and void; and said Court thereupon forever enjoined said County Treasurer and County Auditor from collecting or attempting to collect said taxes and penalties from the Bank and cancelled the lien of the same on the Bank's real estate; and as to the Second Cause of Action for the recovery of taxes paid under protest for the years 1926 and 1927, it entered judgment for the County Treasurer and County Auditor; and finding that its judgment is in conflict with the judgment pronounced upon the same question by the Court of Appeals of Belmont County, it certified the record in the case to the Supreme Court of Ohio for review and final determination. (R., pages 48 to 53, inclusive).

The Supreme Court of Ohio thereafter heard the case and decided the same on June 30, 1943, being cause No. 29199 in that Court, as follows:

> "1. Under the provisions of Section 5408, General Code, as in effect prior to January 1, 1931, all the

shares of the stockholders in an incorporated bank or banking association located in this state, incorporated or organized under the laws of this state or the United States, are required to be listed for taxation at their true value in money.

"2. The provisions of Section 5672, General Code, as in effect prior to January 1, 1931, making the taxes assessed on shares of stock in a bank or banking association a lien on such shares until paid, and imposing upon such bank or banking association the duty to collect the taxes due upon its shares of stock from the owners thereof and pay the same to the treasurer of the county in which such bank or banking association is located, and imposing upon any bank or banking association failing to pay such taxes a liability by way of penalty for the gross amount of taxes due from all the owners of the shares of stock, do not impose a tax on the bank and are not violative of the provisions of Section 548 of Title 12 of the Code of Laws of the United States prescribing the manner in which taxes affecting national banks may be levied and assessed.

"3. The placing of the levy of taxes on the tax duplicate against the bank instead of the respective owners of the shares of stock does not constitute the same a lien on the real estate of the bank.

"4. The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a bank to collect the taxes due upon its shares of stock and pay same to the treasurer of the county by the provisions of Section 5672, General Code."

and entered its Judgment on said last-mentioned date in the following language, to-wit:

"January Term, A. D. 1943, to-wit: June 30, 1943:

"This cause came on to be heard upon the Transcript of the Record of the Court of Appeals of Belmont County and was argued by counsel. On consideration

whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals, insofar as said decree orders that the pretended liens against the real estate of the Appellee now appearing of record in the office of the Recorder of Belmont County, Ohio, be cancelled of record and that the Clerk of the Court issue a certificate releasing and discharging said taxes and penalties of record against the real estate of Appellee and insofar as the Court renders judgment for Appellants on the Second Cause of Action herein be and the same hereby is affirmed; and it is further ordered and adjudged by this Court that in all other respects the judgment of the said Court of Appeals be and the same hereby is reversed and final judgment rendered in favor of the Appellants for the reasons stated in the Opinion rendered in this case.

"It is further ordered and adjudged that Appellants herein recover from Appellee their costs expended in this Court and in the Court of Appeals, taxed at $——.

"Ordered that a special mandate be sent to the Court of Appeals of Belmont County to carry this judgment into execution." (page 229 of Journal 37) (R. page ——).

The decision and Judgment of the Supreme Court of Ohio are contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to the provisions of Section 5219 of the Revised Statutes of the United States, as construed by the Supreme Court of the United States in many cases but notably in the case of *Owensboro National Bank* vs. *Owensboro,* (1899), (173 U. S. 664, 43 Law. Ed. 850, and the case of *First National Bank of Gulfport, Mississippi,* vs. *Adams, Revenue Agent,* (1922) 258 U. S. 362, 66 Law. Ed. 661, 42 S. Ct. 323.

F.

Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

The questions involved in this suit are whether a state taxing official of the State of Ohio (the County Auditor) may list and assess a tax in solido, or in a lump sum, in the name of and against a National Bank, based upon the Bank's net capital, surplus and undivided profits, excluding its real estate; and thus make the same a direct liability of the shareholders of the Bank and a lien on their shares; and thus impose upon such Bank the duty to collect such taxes from the shareholders and pay the same to the Treasurer of the County in which such Bank is located; and also impose upon any Bank failing to pay such taxes a liability, by way of penalty, for the gross amount of taxes so assessed, notwithstanding the fact that it has been held by the Supreme Court of the United States that:

> "1. A state is without power to tax national banks except under the permissive legislation of Congress.
>
> "2. Under United States Revised Statutes, Section 5219, the power of a state to tax national banks is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank * * *
>
> "4. A tax on a corporation or its property is not the legal equivalent of a tax on the stock in the names of the stockholders.
>
> "5. Taxes imposed on a national bank and its property and franchises and not upon the shares of stock in the names of the stockholders are void."—Owensboro National Bank *vs.* Owensboro, (1899), 173 U. S. 664, 43 Law. Ed. 850.

While the provisions of Section 5219 of the Revised Statutes of the United States have been amended since the de-

cision of the Supreme Court last cited, such amendments have not affected the validity of said decision for the reason that Section 5219 of the Revised Statutes of the United States, as amended, still authorizes the states to tax the shares of stock of a national bank as one of four methods of taxation and then provides, if a state imposes one of the four methods of taxation, it shall be in lieu of the others, in the following language, to-wit:

> Section 5219, Revised Statutes of the United States —"State Taxation. The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
>
> "1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.
>
> "(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks: Provided, that bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed money capital within the meaning of this section.
>
> "(c) In the case of a tax on or according to or measured by the net income of an association, the taxing state may, except in case of a tax on net income, in-

clude the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing state upon mercantile, manufacturing, and business corporations doing business within its limits: Provided, However, that a state which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other states and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the state on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the state on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital.

"2. The shares of any national banking association owned by nonresidents of any state shall be taxed by the taxing district or by the state where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon as agent of such nonresident shareholders.

"3. Nothing herein shall be construed to exempt the real property of associations from taxation in any state or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

"4. The provisions of Section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing, ratifying, or confirming by the states of any tax heretofore paid,

levied, or assessed upon the shares of national banks, or the collecting thereof, to the extent that such tax would be valid under said section. (R. S. Sec. 5219; Mar. 4, 1923, c. 267, 42 Stat., 1499; Mar. 25, 1926, c. 88, 44 Stat. 223.)

"(R. S. Sec. 5219 from Act June 3, 1864, c. 106, Sec. 41, 13 Stat., 111; Act Feb. 10, 1868, c. 7, 15 Stat., 34.)"

The State of Ohio has elected to tax the shares of the stockholders, as provided by Statute, as follows:

> Section 5408 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition)—"Shares or Capital of Banks, Incorporated or Unincorporated. All the shares of the stockholders in an incorporated bank or banking association, located in this state, incorporated or organized under the laws of the state or of the United States, and all the shares of the stockholders in an unincorporated bank, located in this state, the capital stock of which is divided into shares held by the owners of such banks and the capital employed, or the property representing it, in an unincorporated bank the capital stock of which is not divided into shares, located in this state, shall be listed at the true value in money, and taxed only in the city, ward, or village where such bank is located."

So that the net effect of Section 5219 of the Revised Statutes of the United States, as amended, and the election of the Legislature of Ohio to tax the shares of the shareholders leaves the law, with respect to taxation thereof in Ohio, in the same condition it was when the case of Owensboro National Bank vs. Owensboro, supra, was decided by the Supreme Court in 1899.

The Supreme Court of the United States has also held that:

> "1. Where the validity of a tax assessment by state officers is properly challenged and the matter comes before the Federal Supreme Court, that Court must

determine the effect of the thing actually done. What might have been done under the local statute is not controlling.

"2. A state tax assessed to a national bank, measured by the value of the bank's capital stock, surplus, undivided profits, and other personal property, is not equivalent to one upon the shareholders in respect of their shares, and such tax is, therefore, invalid under U. S. Revised Statutes, Section 5219 (Title 12, Section 548, U. S. Code) which only permits the state, when assessing taxes, to include national bank shares in the valuation of the personal property of the owner or holder."—First National Bank of Gulfport, Mississippi, vs. Adams, Revenue Agent, 1922), 258 U. S. 362, 66 Law. Ed. 661, 42 S. Ct. 323.

Section 5219 of the Revised Statutes of the United States, as hereinbefore quoted, has been amended since the decision in the case of *First National Bank of Gulfport, Mississippi,* vs. *Adams, Revenue Agent, supra,* but we believe in no way affecting the validity of the decision of the Supreme Court in said last cited case. However, the last previous decision of the Supreme Court of Ohio, in construing the Ohio Statutes with reference to the taxation of National Bank shares, held that:

"1. There is no authority in the statutes of the state nor of the United States for listing and valuing the shares in a national bank in the aggregate and placing such aggregate on the tax list in the name of the bank. Such shares, when listed and valued for taxation, are required to be placed on the proper tax list in the names of the respective owners."—*Miller, Treasurer,* vs. *First National Bank,* (1889) 46 O. S. 424.

And the issue raised by Appellant's contention that the Ohio Statutes here in question are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States and to Section 5219 of the Revised Statutes

of the United States has never been raised before in the Supreme Court of the United States because such construction as the Supreme Court of Ohio has placed upon the Ohio Statutes in question—namely, Sections 5408 to 5414, inclusive, of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition) and Sections 5672 and 5673 of the General Code of Ohio (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition, or 102 Ohio Laws 91)—has never heretofore been placed upon such statutes and, consequently, the question here raised has never been decided by the Supreme Court of the United States.

G.

Stage of Proceedings and Manner in Which Federal Questions Were Raised.

The Federal questions were raised by the original petitions filed in each of the three cases in the Common Pleas Court of Belmont County, Ohio, the Court of first instance, (R., pages 214, 219 and 223, inclusive) which cases were consolidated by that Court into one action and such Federal questions were carried through various amended petitions (R., pages 234, 246, 256, 267) to the Third Amended Petition upon which the case was finally heard by said Common Pleas Court (R., page 10) and in which Third Amended Petition it is alleged:

> "7. By reason of the foregoing the pretended assessment of said taxes against plaintiff by said auditor of Belmont County, Ohio, and threatened collection thereof from plaintiff by said treasurer of Belmont County, Ohio, are, and at all times herein stated were, contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to-wit:
>
> "(a) There is no statute of Ohio nor of the United States of America authorizing or permitting the audi-

tor to make said assessments of taxes against plaintiff.

"(b) * * *

"(c) The statutes of Ohio under authority of which said auditor and treasurer pretended to have assessed said taxes against plaintiff and to have the right to collect the same from plaintiff, respectively, are in violation of Section 5219 of the Revised Statutes of the United States of America, now Section 548 of Title 12 of the United States Code, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America * * *" (R., page 10).

Issue was joined on these allegations by the Fourth Defense of the Answer of the County Treasurer and the County Auditor, in which it was stated that:

"Each of said Defendants * * * denies that the said Auditor ever attempted to or did levy or assess a tax in any amount or at any time against Plaintiff for either of the years stated in said Third Amended Petition upon any property of Plaintiff other than its real estate; * * * denies that said Auditor did not at any time list or assess against the owners of the shares of the capital stock of said corporation for said years a tax or taxes upon their respective shares; denies that said Auditor did not place upon said Tax Duplicates for said years the values of the shares of capital stock of Plaintiff in the names of the respective owners of such shares of stock; denies that said Auditor attempted to or did impose against said Plaintiff any amount of taxes or penalty; denies that the pretended assessment of said taxes by said Auditor of Belmont County, Ohio, are or were contrary to law or in violation of any right of Plaintiff * * *" (R., page 16).

The said Federal questions raised by the pleadings were also urged by the Bank by oral argument and in briefs filed in said Court of Common Pleas. In the Court of

Appeals of Belmont County, Ohio, the case was heard upon the same pleadings as in the Court of Common Pleas and the Federal questions were thus again raised by the pleadings and the Bank urged the same in oral argument (R., page 48) and by brief submitted in said Court of Appeals.

In the Supreme Court of Ohio the case was heard on said pleadings and the Record, made in the two lower Courts, where the Federal questions involved were urged both in oral argument and in printed briefs.

H.

The Manner in Which Questions Involved Were Passed Upon by the Court.

Said *Court of Common Pleas* held that the taxes in question:

> "were not and are not imposed upon The First National Bank of St. Clairsville, Ohio; that said taxes were and are imposed in the aggregate solely upon the shares of stock in said banking association; that said taxes are a lien on said shares; that said lien on said shares continues until said taxes are paid; that neither of said banking association nor its shareholders is personally liable for the payment of any portion of said taxes; that said shares of stock alone are liable for the payment of said taxes to the extent of the value of said shares and of any distribution on account thereof; and that said taxes are due and payable but are not collectible unless and until the same are apportioned to the several shares and are entered on the appropriate tax lists and tax duplicates in the names of the several holders of said shares.
>
> "It is, therefore, ordered, adjudged and decreed that the temporary injunction heretofore granted with respect to said taxes in actions numbered 31258, 31805 and 32733, heretofore consolidated with and under the number of this action, be and the same hereby is made

perpetual so far as to prevent Defendants Auditor, Treasurer and Recorder, and their successors in office, respectively, or either of them, (1) from collecting or attempting to collect the same from the Plaintiff herein in its corporate capacity or from the stockholders of Plaintiff corporation as a personal liability of either said corporation or said shareholders and (2) from collecting or attempting to collect the same by enforcing the lien of said taxes on said shares unless and until the aggregate amount of taxes imposed upon said shares is apportioned to the several shares and are entered on the appropriate tax lists and tax duplicates in the names of the several holders of said shares, respectively.

"It is further ordered, considered and adjudged that the pretended lien against the real estate of Plaintiff, now appearing of record in the office of the County Recorder for and on account of taxes listed on the tax list and tax duplicate for each of the years 1928, 1929 and 1930, be and the same hereby are cancelled of record * * *" (R. pages 35 to 37, inclusive).

Said *Court of Appeals* held:

"4. That the said Auditor of Belmont County, Ohio, assessed taxes against Plaintiff, The First National Bank of St. Clairsville, Ohio, upon the amounts of its capital, surplus and undivided profits, after deducting therefrom the value of all the real estate owned by Plaintiff, as exhibited by said reports hereinbefore mentioned, as follows:

For the year 1928	$7,152.56
For the year 1929	7,432.02
For the year 1930	7,784.02

which amounts were, thereafter, by said Auditor of Belmont County, Ohio, placed against Plaintiff, The First National Bank of St. Clairsville, Ohio, upon said Auditor's Tax Lists and the Tax Duplicates of said county for the said years 1928, 1929 and 1930, respectively, were certified and transmitted by said Auditor

to said Treasurer for collection from Plaintiff, but Plaintiff has not paid any part of said taxes for said years and said Auditor of Belmont County did not, at any time list or assess against the owners of the shares of capital stock of Plaintiff, for any of said years, a tax or taxes upon their respective shares in any amount or amounts whatsoever and did not, at any time, place on said Tax Lists or Tax Duplicates for said years the values of the shares of the capital stock of Plaintiff in the names of the respective owners of such shares of stock; and that said Auditor assessed a penalty against Plaintiff, The First National Bank of St. Clairsville, Ohio, when said taxes became delinquent in each of said years, of ten per cent of the amount of said tax for each of said years and added the same to the Auditor's respective Tax Lists and the Treasurer's respective Tax Duplicates in the name of and against said Plaintiff, The First National Bank of St. Clairsville, Ohio;

"5. That said Auditor of Belmont County, Ohio, filed said assessments of taxes and penalties against Plaintiff, The First National Bank of St. Clairsville, Ohio, in the office of the Recorder of Belmont County, Ohio, for and thereby obtained liens against the real estate of Plaintiff, The First National Bank of St. Clairsville, Ohio, which filing constituted a cloud on the title of all the real estate standing of record in the name of Plaintiff, The First National Bank of St. Clairsville, Ohio, to Plaintiff's irreparable damage and against which Plaintiff has no adequate remedy at law.

"6. That said Defendants will, unless restrained by order of Court, take legal action against Plaintiff to enforce the collection of such taxes and penalties and, against such acts and threatened acts of Defendants, Plaintiff has no adequate remedy at law and will suffer irreparable injury thereby; that said assessments of taxes and penalties against Plaintiff, The First National Bank of St. Clairsville, and the threatened col-

lection thereof from Plaintiff, were and are contrary to law; and that said taxes and penalties thereon so assessed against Plaintiff are illegal and void and the liens of said taxes and penalties filed in the office of the Recorder of Belmont County, Ohio, are illegal and void.

"It is, therefore, ordered, adjudged and decreed that the Defendants, and their respective successors in office, be and they are hereby forever enjoined from collecting or attempting to collect from Plaintiff said taxes and penalties; that the pretended liens against the real estate of Plaintiff, now appearing of record in the office of the Recorder of Belmont County, Ohio, for and on account of said pretended taxes and penalties, be and the same are hereby ordered cancelled of record * * *" (R. pages 48 to 53, inclusive).

The Supreme Court of Ohio held that:

"1. Under the provisions of Section 5408, General Code, as in effect prior to January 1, 1931, all the shares of the stockholders in an incorporated bank or banking association located in this state, incorporated or organized under the laws of this state or the United States, are required to be listed for taxation at their true value in money.

"2. The provisions of Section 5672, General Code, as in effect prior to January 1, 1931, making the taxes assessed on shares of stock in a bank or banking association a lien on such shares until paid and imposing upon such bank or banking association the duty to collect the taxes due upon its shares of stock from the owners thereof and pay the same to the treasurer of the county in which such bank or banking association is located and imposing upon any bank or banking association failing to pay such taxes a liability by way of penalty for the gross amount of the taxes due from all the owners of the shares of stock do not impose a tax on the bank and are not violative of the provisions of Section 548 of Title 12 of the Code of Laws of the

United States prescribing the manner in which taxes affecting national banks may be levied and assessed.

"3. The placing of the levy of taxes on the Tax Duplicate against the bank instead of the respective owners of the shares of stock does not constitute the same a lien on the real estate of the bank.

"4. The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a bank to collect the taxes due upon its shares of stock and pay same to the treasurer of the county by the provisions of Section 5672, General Code" (142 O. S. 6).

I.

Excerpts from the Record Bringing the Cause Within the Statute Conferring Jurisdiction on the Supreme Court.

The following excerpts from the Record show that this cause is within the Statute conferring jurisdiction on the Supreme Court:

Pleadings.

Third Amended Petition (Excerpts):

"3. Plaintiff delivered detailed reports in duplicate of plaintiff's resources and liabilities as of the close of business on the Wednesday next preceding the second Monday in May in each of the years hereinafter set forth, together with full statements of the names and residences of plaintiff's stockholders and the number of shares of the capital stock of plaintiff held by each and the par value of each share to the auditor of Belmont County, Ohio, on the dates hereinafter set forth, as required by law, which reports showed the capital stock, surplus and undivided profits of plaintiff, after deducting the value of the real estate owned by plaintiff, to be the amount set forth opposite the respective dates of

filing said reports with the county auditor as follows, to-wit:

"* * *

"May 14, 1928	$288,410.00
"May 20, 1929	275,260.00
"May 31, 1930	246,330.00

and plaintiff at all times kept in its office, where its business was transacted, a full and correct list of the names and residences of plaintiff's stockholders and the number of shares held by each, which list at all times during business hours was open to the inspection of said auditor and said treasurer (R., page 3).

"4. The said auditor of Belmont County attempted to impose upon plaintiff by levying and assessing against plaintiff for the years * * * 1928, 1929 and 1930, upon the amount of its capital, surplus and undivided profits, after deducting therefrom the value of all the real estate owned by plaintiff, as exhibited by said reports and hereinabove set forth, taxes for said years as follows:

"* * *

"For the year 1928	$7,152.56
"For the year 1929	7,432.02
"For the year 1930	7,784.02

which amounts were thereafter, by said auditor of Belmont County, Ohio, placed against plaintiff upon the tax duplicate of said county for the respective years * * * 1928, 1929 and 1930, and certified and transmitted to the treasurer of Belmont County, Ohio, for collection by him from the plaintiff but plaintiff has not paid any part of said taxes except those for the years 1926 and 1927 * * *; and said auditor of Belmont County, Ohio, did not at any time list nor assess against the owners of the shares of capital stock of plaintiff for any of said years 1926 to 1930, inclusive, a tax or taxes upon their respective shares in any amount or amounts whatsoever, and did not at any time place on said tax

duplicates for said years the values of the shares of capital stock of plaintiff in the names of the respective owners of such shares of stock (R., page 4).

"Defendants filed said pretended assessments and pretended levy in the office of the recorder of Belmont County for a lien against real property, which filing constituted a cloud on the title of all the real estate standing of record in the name of plaintiff at the time, to plaintiff's irreparable damage, against which it has no adequate remedy at law (R., page 5).

"5. * * *.

"6. * * *.

"7. By reason of the foregoing the pretended assessment of said taxes against plaintiff by said auditor of Belmont County, Ohio, and threatened collection thereof from plaintiff by said treasurer of Belmont County, Ohio, are, and at all times herein stated were, contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to-wit:

"(a) There is no statute of Ohio nor of the United States of America authorizing or permitting the auditor to make said assessments of taxes against plaintiff.

"(b) * * * (R., page 10).

"(c) The statutes of Ohio under authority of which said auditor and treasurer pretend to have assessed said taxes against plaintiff and to have the right to collect the same from plaintiff, respectively, are in violation of Section 5219 of the Revised Statutes of the United States of America now Section 548 of Title 12 of the United States Code and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America * * * (R., page 10).

"8. * * *.

"9. The defendants and each of them will, unless restrained by order of this court, place penalties upon

plaintiff for its failure to pay said taxes at the times fixed by law for such payment and will take legal action against plaintiff to enforce the collection of such taxes and penalties from plaintiff and against such acts and threatened acts of defendants plaintiff has no adequate remedy at law and will suffer irreparable injury thereby * * * (R., page 14).

"Wherefore plaintiff prays that all said pretended taxes levied and assessed against the plaintiff for the years aforesaid be declared, adjudged and decreed to be * * * invalid, illegal and void; that any purported lien upon the property of plaintiff by reason thereof or arising therefrom be decreed to be void and of no effect; that defendants and their respective successors in office be enjoined from collecting or attempting to collect from plaintiff the said taxes levied and assessed during the years 1928, 1929 and 1930; that pending the determination of this action a temporary restraining order be issued forbidding any action upon the part of defendants in collecting said taxes or assessing any penalties for the failure to pay said taxes and that upon final hearing said restraining order be made permanent and that plaintiff have such other and further relief as is proper"—(R., page 15).

Fourth Defense of Defendants' Answer to Third Amended Petition:

"17. Each of said defendants * * * denies that the said auditor ever attempted to or did levy or assess a tax, in any amount or at any time, against plaintiff, for either of the years stated in said third amended petition, upon any property of plaintiff other than its real estate; denies that the taxes referred to in said third amended petition are other than as imposed by law on shares of plaintiff's capital stock in the amount of their true value in money, less the value of the real estate included in its said statement of resources as it stands upon the tax duplicate relating to real estate; denies that said auditor did not at any time list or assess against the owners of the shares of the capital

stock of said corporation for said years a tax or taxes upon their respective shares; denies that said auditor did not place upon said tax duplicates for said years the values of the shares of capital stock of plaintiff in the names of the respective owners of such shares of stock; denies that said auditor attempted to or did impose against said plaintiff any amount of taxes or penalty; denies that the pretended assessment of said taxes by said auditor of Belmont County, Ohio, are or were contrary to law or in violation of any right of plaintiff; * * *" (R., page 21).

Cross Examination of E. E. Taylor, present Auditor of Belmont County, Ohio, (Excerpts):

"Q. State your name, please.

"A. E. E. Taylor.

* * * * * * *

"Q. You are the county auditor of Belmont County?

"A. Yes, sir. * * * (R., page 107).

"Q. I hand you paper marked PX3 and ask you to say what that is.

"A. It is return of the First National Bank of St. Clairsville for the year 1928, filed on the 14th day of May, 1928, and sworn to by the cashier of the First National Bank.

"Q. I hand you a paper marked PX4 and ask you to state what that is.

"A. It is a return of the First National Bank of St. Clairsville for the year 1929, filed on May 20th, 1924, and sworn to by the cashier of said bank.

"Q. I hand you a paper marked PX5 and ask you to state what that is.

"A. It is a return of the First National Bank of St. Clairsville for the year 1930, filed on May 31st, 1930, sworn to by the cashier of said bank.

"Q. Were these—do you know whether these statements were filed in duplicate?

"A. I don't know, Mr. Lewis. That's all I have. That's all that is in the file. (R., page 110)

* * * * * * *

"Now, I offer in evidence exhibit marked PX4, the annual statement of the First National Bank of St. Clairsville, Belmont County, Ohio, for the year 1929.

"Court: It may be received. (R., page 121)

* * * * * * *

"Now, I offer in evidence annual statement of First National Bank of St. Clairsville, Ohio, for the year 1930, marked PX5.

"Court: It may be received. (R., page 122)

* * * * * * *

Copies of that part of exhibits marked PX3, PX4 and PX5 showing detail of resources and liabilities of the Bank for the years 1928, 1929 and 1930, respectively, as contained in said annual statements filed with the County Auditor, are set forth in "Appendix D," page 65, et seq., hereof.

"Q. Now, Mr. Taylor, I think I asked you last about the return for the year 1927. I will ask you now to produce, if you will, please, the permanent record of the assessment of taxes based upon this return of the plaintiff bank for the year 1928, marked PX3.

"A. (Witness produces book.) (R., page 122)

"Q. What record do you have now?

"A. Tax Book, Personal Property, 1928.

"Q. And where do you find this permanent record of the listing for taxation?

"A. In property of St. Clairsville corporation.

"Q. And in what—will you kindly read what the assessment or listing is of how this is set out?

"A. In the name of First National Bank, the value $288,410.

"Q. All right.

"A. The half tax $3,576.28. Year's tax $7,152.56. Tax of December not paid $3,576.28. Tax of June, 1929, $7,152.56.

"Q. That indicates that amount of taxes has not been paid, does it?

"A. There are no marks there.

"Q. No mark to indicate that. All right. Now, I ask you to produce the tax list, permanent record, for the year 1929, showing the listing for taxation of property that is set forth in the annual statement of First National Bank, plaintiff in this case, for that year, under return marked PX4.

"A. The tax book of personal property for the year 1929, under St. Clairsville corporation, in the name of First National Bank, of the value of $275,260. Half tax $3,716.01. Total tax $7,432.02. Tax for December not paid $3,716.01. Penalty on December Tax $743.20. Total tax and penalty due June, 1930, $8,175.22.

"Q. By the way, Mr. Taylor, I notice that you have here on this tax list record for the year 1929 a mention of a penalty of $743.20. Will you tell us what that means? What is that penalty?

"Mr. Sedgwick: Object to the question.

"Court: Overruled. (R., page 123)

"Mr. Sedgwick: Exception.

"Court: If he knows he may say.

"A. When the first half tax isn't paid, the first half collection, under the law a ten per cent penalty attaches.

"Q. And that is what represents, is it?

"A. Yes, sir.

* * * * * * *

"Q. So there are penalties assessed for—ten per cent for each year that the tax is not paid, that is, for the year 1928 and the year 1927.

"A. That's right.

* * * * * * *

"Q. And were 1928. Now, I will ask you to produce the permanent tax record, tax list, for the year 1930 showing the tax assessed, based upon the statement of the First National Bank for that year, which has been introduced in evidence as PX5, exhibit PX5. What book are you producing?

"A. Tax book for personal properties for the year 1930, St. Clairsville corporation, in the name of First

National Bank. The value $246,330. One half tax $3,892.01. Total tax due December, 1930, $3,892.01. Total tax for the year 1930 $7,784.02. Tax for December 1930 not paid $3,892.01. Penalty on December tax $778.40. Total tax and penalty due June 1931 $8,562.42. (R., page 124)

"Q. Now, Mr. Taylor, is there any other listing of property for taxation, to your knowledge, in anybody's name, based upon these returns of the bank marked * * * PX3, PX4 and PX5, in any other name?

"Mr. Sedgwick: Object to the question.

"Q. Than that which you have already read?

"Mr. Sedgwick: Object to the question.

"Q. Or at any other place in these tax lists for the respective years than those places that you have pointed out?

"Mr. Sedgwick: Object to the question.

"Court: Well, if he has personal knowledge of that, he may testify. If he has personal knowledge of that matter. If he hasn't, I won't require him to answer it.

"A. That's all I know of. (R., page 125)

* * * * * * *

"Earl Lewis: I also offer in evidence that portion of tax book marked 'personal, 1928,' from which this witness has read.

"Court: It may be received. (R., page 128)

* * * * * * *

"Earl Lewis: I also offer in evidence that portion of tax book, marked 'personal, 1929,' from which this witness has read.

"Court: It may be received.

"Earl Lewis: I am also offering in evidence that portion of tax book, marked 'personal, 1930,' from which this witness has read.

"Court: It may be received.

"Earl Lewis: Now, if the court please, by agreement, we want to carry these consecutive numbers, so we would suggest that exhibit for the year taken from

the book marked tax book, 'personal, 1926,' be designated as PX6, and the exhibit taken from tax book marked 'personal, 1927,' be marked PX7, and that exhibit taken from tax book marked 'personal, 1928,' be marked PX8, and that taken from the tax book marked 'personal, 1929,' be marked PX9, and that taken from tax book marked 'personal, 1930,' be designated as PX10. Is that correct?

"Mr. Sedgwick: That is the record the way we have it.

"Earl Lewis: The court, I guess, assents to that request?

"Court: Yes." (R., page 129)

Cross Examination of Homer J. Findley, present Treasurer of Belmont County, Ohio, (Excerpts):

"Q. Your name is Homer J. Findley, is it not?

"A. J. Findley.

"Q. You are treasurer of Belmont County?

"A. That's right. (R., page 133)

* * * * * * *

"Q. That's all. I will ask you to produce the records in your custody or possession showing the taxes levied, listed and assessed for the year 1928.

"A. (Witness produces book.)

"Q. Do you have that?

"A. I do.

"Q. And what is the name of the volume? How is it marked?

"A. 1928, Richland Townhsip.

"Q. And the heading appearing on it?

"A. It is page 141, treasurer's duplicate of taxes assessed on personal property in St. Clairsville village, Belmont County, Ohio, for the year 1928.

"Q. All right. Now I will ask you to read the headings and the proper entry and the entries that are made under those headings in respect to the matter in controversy.

"A. Receipt number 4103. Owner's name——

"Q. What is the line number?

"A. Line number 2.

"Q. All right.

"A. Owner's name, The First National Bank, listed under banks. Value as equalized by assessor, $288,410. Value as equalized by board of revision on complaints. (R., page 140).

"Q. Is there any entries under that?

"A. Not any. Value as equalized by tax commission.

"Q. Is there any entries under that?

"A. None under that.

"Q. Go ahead.

"A. Total tax due December, 1928, $3,576.28. Total tax 1928 and delinquent tax 1927, $7,152.56. Tax of December 1928 not paid, $3,576.28. Total tax and penalty due June, 1929, $7,152.56.

"Q. Is there a line number on the margin?

"A. Line number 2. (R., page 141.)

* * * * * * *

"Q. Now, Mr. Findley, I will ask you to produce the records that you have for the year 1929.

"A. (Witness produces book.)

"Q. Read the heading across the—or, first strike that. What record have you produced, now, and how is it marked?

"A. Richland Township, 1929.

"Q. All right. And read the heading across the page. First, what page is it?

"A. Page 141. Treasurer's duplicate of taxes assessed on personal property in St. Clairsville village, Belmont County, Ohio, for the year 1929.

"Q. Now, will you give us the line on that page on which the entry appears?

"A. Line number 3.

"Q. Now give us the column headings and the appropriate entries under each column heading.

"A. Receipt number, being 4084, and the owner's name The First National Bank. Listed under banks. Value as equalized by assessor, $275,260. Value as

equalized by board of revision on complaints, nothing. Value as equalized by tax commission. Total tax due December, 1929, $3,716.01.

"Q. Remarks?

"A. Delinquent.

"Q. Wait a minute. Tax is ahead of remarks, is it?

"A. Remarks. (R., page 142.)

"Q. Delinquent. All right.

"A. Total 1929 and delinquent tax of 1928, $7,432.02. Under remarks, nothing. Tax of December, 1929, not paid, $3,716.01. Penalty on December tax, $743.20. Total tax and penalty due June, 1930, $8,175.22. Remarks, delinquent.

"Q. The line number?

"A. Number 3.

"Q. All right. Now, Mr. Findley, is there any other record in your possession showing the listing for taxes of the property of First National Bank of St. Clairsville, Ohio, or of its shares?

"A. Not that I know of.

* * * * * * *

"Q. And I will ask you to state what records you have,—how the book is designated.

"A. Richland township for 1930.

"Q. Give us the heading across the page, stating the number of the page, please.

"A. Page 144. Treasurer's duplicate of taxes assessed on personal property in St. Clairsville Village, Belmont County, Ohio, for the year 1930.

"Q. On what line, now, does the entry that we are concerned with appear?

"A. Line number 3.

"Q. And now I will ask you to read the appropriate column headings and the entries on line number 3 under those headings. (R., page 143.)

"A. Receipt number. We have receipt number 4059. Owner's name, First National Bank. Listed under banks. Value as equalized by assessor, $246,330. Value as equalized by board of revision on complaints, nothing. Value as equalized by tax commission, nothing.

Tax for the year 1930, $3,892.01. Total tax due December, 1930, $3,892.01. Under heading of remarks, delinquent. Total tax 1930 and delinquent tax of 1929, $7,784.02. Remarks, nothing. Tax of December, 1930, not paid, $3,892.01. Penalty on December tax, $778.40. Total tax and penalty due June, 1931, $8,562.42. Under remarks, delinquent. Line 3.

"Q. Then what follows?

"A. On the margin it is the same amount.

"Q. What is it?

"A. $8,562.42.

"Mr. Sedgwick: Mr. Lewis and the court, please, I think the treasurer made a reference there that all of us understands that might be misleading. He has read certain headings and the word 'nothing.' I think it would perhaps explain the true situation if he said 'blank' instead of 'nothing.' I have looked at the records and know none of them has the notation 'nothing.' I think that is true of Mr. Lewis. In other words, where the treasurer has used the word 'nothing' there appears a blank.

"Roy Lewis: Yes.

"Court: That's right. (R., page 144.)

* * * * * * *

"Earl Lewis: Now, if the court please, I offer in evidence these several records. I offer in evidence * * * as PX13 the record for the year, identified as for the year 1928, and as PX14 the record for the year 1929, and as PX15 the record for the year 1930. (R., page 146.)

"Court: They may be received."—(R., page 147.)

Copies of exhibits marked PX13, PX14 and PX15 are set out in full in "Appendix E," page 81, et seq., hereof.

"Court: I was just wondering. Mr. Sedgwick agreed there was this lien taken. If they agree the lien was taken, would it make any difference then how it was taken?

* * * * * * *

"Mr. Sedgwick: We didn't deny these taxes were made a lien. In fact, we admit all through the pleadings the taxes were made a lien and also say in accordance with the section of the statute, which was 5694."—(R., page 154.)

Journal Entry of Court of Common Pleas of Belmont County, Ohio, November 25, 1940, (Excerpts):

"This cause was heard on the third amended petition, of plaintiff, the answer of defendants and the evidence, and was submitted to the court. * * *

"On consideration of said pleadings and the evidence, the court find, on the issues joined with respect to the first cause of action alleged in said third amended petition, as follows: that the taxes mentioned and described therein, as they appear on the records in the office of defendant auditor and of defendant treasurer for each of the years 1928, 1929 and 1930, were not and are not imposed upon The First National Bank of St. Clairsville, Ohio; that said taxes were and are imposed in the aggregate solely upon the shares of stock in said banking association; that said taxes are a lien on said shares; that said lien on said shares continues until said taxes are paid; that neither of said banking association nor its shareholders is personally liable for the payment of any portion of said taxes; (R., page 35) that said shares of stock alone are liable for the payment of said taxes to the extent of the value of said shares and of any distribution on account thereof; and that said taxes are due and payable but are not collectible unless and until the same are apportioned to the several shares and are entered on the appropriate tax lists and tax duplicates in the names of the several holders of said shares.

"It is therefore ordered, adjudged and decreed that the temporary injunction heretofore granted with respect to said taxes in actions numbered 31258, 31805 and 32733, heretofore consolidated with and under the number of this action be, and the same hereby is, made perpetual, subject to the conditions and limitations

hereinafter stated, so far as to prevent defendants auditor, treasurer and recorder and their successors in office, respectively, or either of them, (1) from collecting or attempting to collect the same from the plaintiff herein, in its corporate capacity, or from the stockholders of plaintiff corporation, as a personal liability of either said corporation or said shareholders; and (2) from collecting or attempting to collect the same by enforcing the lien of said taxes on said shares, unless and until the aggregate amount of taxes imposed upon said shares is apportioned to the several shares and are entered on the appropriate tax lists and tax duplicates in the names of the several holders of said shares, respectively.

"It is further ordered, considered and adjudged that the pretended lien against the real estate of plaintiff now appearing of record in the office of the county recorder, for and on account of taxes listed on the tax list and tax duplicate for each of the years 1928, 1929 and 1930, be, and the same hereby are, canceled of record, and that the recorder be, and he is ordered to note on the margin of each and all appropriate records in his office the cancellation thereof by, and the date of, the entry hereof."—(R., pages 36 and 37)

Journal Entry of Court of Appeals of Belmont County, Ohio, November Term, 1941, (May 4), (Excerpts):

"This cause now coming on for hearing upon appeal on questions of law and fact upon the third amended petition and supplemental petition and the answer thereto, and the reply, the transcript of docket and journal entries, and the evidence, and the arguments and briefs of counsel for the parties; and the court, being fully advised in the premises, finds in favor of plaintiff, The First National Bank of St. Clairsville, Ohio, and against the defendants, the treasurer of Belmont County, Ohio, and the auditor of Belmont County, Ohio, on the first cause of action of the third amended petition and supplemental petition, as follows:

* * * * * * *

"(3) That the cashier of plaintiff, The First National Bank of St. Clairsville, Ohio, duly delivered detailed reports, in duplicate, of plaintiff's resources and liabilities as of the close of business on the Wednesday next preceding the second Monday in May in each of the years mentioned in said third amended petition and supplemental petition together with a full statement of the names and residences of plaintiff's stockholders and the number of shares of the capital stock of plaintiff held by each and the par value of each share, to the auditor of Belmont County, Ohio, on the dates hereinafter set forth, as required by law, which reports showed the capital, surplus and undivided profits of said plaintiff, after deducting the value of the real estate owned by plaintiff, to be the amount set forth opposite the respective dates of filing said reports with said county auditor, as follows, to-wit:

"May 14, 1928	$288,410.00
May 20, 1929	275,260.00
May 31, 1930	246,330.00

and said plaintiff, at all times, kept in its office where its business was transacted a full and correct list of the names and residences of said plaintiff's stockholders and the number of shares held by each, which list, at all times during business hours, was open to the inspection of said treasurer and said auditor;

"(4) That the said auditor of Belmont County, Ohio, assessed taxes against plaintiff, The First National Bank of St. Clairsville, Ohio, upon the amounts of its capital, surplus and undivided profits, after deducting therefrom the value of all the real estate owned by plaintiff, as exhibited by said reports hereinbefore mentioned, as follows:

"For the year 1928	$7,152.56
For the year 1929	7,432.02
For the year 1930	7,784.02

which amounts were, thereafter, by said auditor of Belmont county, placed against plaintiff, The First National Bank of St. Clairsville, Ohio, upon said auditor's tax list and the tax duplicates of said county for the said years said taxes, for said years and said auditor of Belmont County did not, at any time, list or assess against the owners of the shares of capital stock of plaintiff for any of said years a tax or taxes upon their respective shares in any amount or amounts whatsoever and did not, at any time, place on said tax lists or tax duplicates for said years the values of the shares of the capital stock of plaintiff in the names of the respective owners of such shares of stock; and that said auditor assessed a penalty against plaintiff, The First National Bank of St. Clairsville, Ohio, when said taxes became delinquent in each of said years of 10 per cent of the amount of said tax for each of said years and added the same to the auditor's respective tax lists and the treasurer's respective tax duplicates in the name of and against said plaintiff, The First National Bank of St. Clairsville, Ohio; (R., pages 49, 50 and 51)

* * * * * * *

"(6) That said defendants will, unless restrained by order of court, take legal action against plaintiff to enforce the collection of such taxes and penalties, and against such acts and threatened acts of defendants, plaintiff has no adequate remedy at law and will suffer irreparable injury thereby; that said assessments of taxes and penalties against plaintiff, The First National Bank of St. Clairsville, Ohio, and the threatened collection thereof from plaintiff were and are contrary to law; and that said taxes and the penalties thereon so assessed against plaintiff are illegal and void and the liens for said taxes and penalties filed in the office of the recorder of Belmont County, Ohio, are illegal and void.

"It is, therefore, ordered, adjudged and decreed that the defendants, and their respective successors in office, be and they are hereby forever enjoined from col-

lecting or attempting to collect from plaintiff said taxes and penalties; that the pretended liens against the real estate of plaintiff, now appearing of record in the office of the recorder of Belmont County, Ohio, for and on account of said pretended taxes and penalties, be and the same are hereby ordered cancelled of record, and the clerk of this court is hereby ordered to issue his certificate to the said recorder of Belmont County, Ohio, releasing and discharging said taxes and penalties of record, and the same shall be entered on the personal tax lien record of said recorder of Belmont County, Ohio, to all of which defendants except."—(R., pages 51 and 52)

Journal Entry of Supreme Court of Ohio, January Term, A. D. 1943, (June 30):

"This cause came on to be heard upon the Transcript of the Record of the Court of Appeals of Belmont County and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals, insofar as said decree orders that the pretended liens against the real estate of the Appellee now appearing of record in the office of the Recorder of Belmont County, Ohio, be cancelled of record and that the Clerk of the Court issue a certificate releasing and discharging said taxes and penalties of record against the real estate of Appellee and insofar as the Court renders judgment for Appellant on the Second Cause of Action herein be and the same hereby is affirmed; and it is further ordered and adjudged by this Court that in all other respects the judgment of the said Court of Appeals be and the same hereby is reversed and final judgment rendered in favor of the Appellants for the reasons stated in the Opinion rendered in this case.

"It is further ordered and adjudged that Appellants herein recover from Appellee their costs expended in this Court and in the Court of Appeals, taxed at $——.

"Ordered that a special mandate be sent to the Court of Appeals of Belmont County to carry this judgment into execution." (142 O. S. 6, page 229 of Journal 37) (R. page ——).

J.

Copy of Opinions on Rendition of Judgment.

Opinions of the Court of Common Pleas, Court of Appeals and of the Supreme Court of Ohio are hereto attached, marked "Appendix A," "Appendix B," and "Appendix C", respectively. •(Clerk's note. These opinions are printed as appendices to the jurisdictional statement in the case of *Second Nat. Bank, etc.* v. *Findley,* No. 421 October Term, 1943).

K.

Cases Believed to Sustain the Jurisdiction.

The following cases sustain the jurisdiction of the Supreme Court of the United States:

1. Jurisdiction to entertain an appeal from the decision of a state court on the ground that a state statute, as construed, is repugnant to the Constitution of the United States:

"In the exercise of the appellate jurisdiction of the Federal Supreme Court over state courts, the former court is bound by the construction of a state law adopted by its court of last resort. But the Federal Supreme Court, while bound by the construction of a state statute adopted by the state court of last resort, is not concluded by its reasoning, but must exercise independent judgment when called upon to determine the Federal question whether the action as construed and applied is repugnant to the restrictions of the Federal Constitution."—*Ward* vs. *Krinsky* (1922) 259 U. S. 502, 42 S. Ct. 529, 66 Law. Ed. 1033, 28 A. L. R. 1207.

"Where the validity of a statute of California, as construed by the California courts, was drawn in question on the ground of its being repugnant to the Constitution of the United States, a judgment of the Supreme Court of California was properly before the United States Supreme Court on Appeal."—*Standard Oil Co. of California* vs. *Johnson* (1942) 62 S. Ct. 1168, 86 Law. Ed. 1611, reversing 119 P. 2d 329.

"The United States Supreme Court in passing on Constitutional questions regards substance and the statute attacked must be tested by its operation and effect."—*Near* vs. *The State of Minnesota* (1931) 51 S. Ct. 625, 283 U. S. 697, 75 Law. Ed. 1357.

Smith vs. *Cahoon*, 283 U. S. 553.

Aero Mayflower T. Co. vs. *Georgia Public Service Commission*, 295 U. S. 284.

Hartford Steam Boiler Co. vs. *Harrison, Insurance Commissioner*, 301 U. S. 458.

2. Jurisdiction to entertain an appeal from the decision of a state court on the ground that a state statute, as construed, is repugnant to a statute of the United States.

"The United States Supreme Court had jurisdiction of writ of error to review suit in the state court where the validity of a state statute providing for a tax on national bank shares is drawn in question as being repugnant to Section 548 of Title 12, United States Code,"—*First National Bank of Guthrie Center* vs. *Anderson* (1926) 46 S. Ct. 135, 269 U. S. 341, 70 Law. Ed. 295.

Northern Pacific Ry. Co. vs. *Washington*, 222 U. S. 370.

Erie Ry. Co. vs. *New York*, 233 U. S. 671.

Pennsylvania R. R. Co. vs. *Public Service Commission*, 250 U. S. 566.

Napier vs. *Atlantic Coastline Ry. Co.*, 272 U. S. 605.

Oregon and Washington R. R. and N. Co. vs. *Washington,* 270 U. S. 87.
Missouri R. R. Co. vs. *Porter,* 273 U. S. 341.

Characterization of a tax by a state court is not binding where a Federal right is concerned.—*Carpenter* vs. *Shaw,* 280 U. S. 363, 74 Law. Ed. 478, 50 S. Ct. 121.

Georgia R. and Electric Co. vs. *Decatur,* 295 U. S. 165, 79 Law. Ed. 1365, 55 S. Ct. 701.
Roe vs. *Kansas,* 278 U. S. 191 73, Law. Ed. 259, 49 S. Ct. 160.

Appeal may be had to the Supreme Court of the United States where a state statute, as construed and applied to a particular transaction, is repugnant to the Constitution or laws of the United States.—*Dahnke-Walker Co.* vs. *Bondurant* (1921) 257 U. S. 282, 42 S. Ct. 106, 66 Law. Ed. 239.

Cudahy Co. vs. *Parramore* (1923) 263 U. S. 418 at 422, 44 S. Ct. 153, 68 Law. Ed. 366.
Snyder vs. *Massachusetts* (1934) 291 U. S. 97 at 115, 54 S. Ct. 330, 78 Law. Ed. 674.
N. C. and St. L. R. Co. vs. *Walters* (1935) 294 U. S. 405 at 415, 55 S. Ct. 486, 79 Law. Ed. 949.
Doty vs. *Love* (1935) 295 U. S. 64 at 71, 55 S. Ct. 558, 79 Law. Ed. 1303.

Appellate jurisdiction of the United States Supreme Court has been invoked and exercised for the protection of a federal claim of right under the statutes of the United States such as the National Banking Law.—*McCormick* vs. *Market Bank* (1897), 165 U. S. 538, 17 S. Ct. 433, 41 Law. Ed. 817.

Seabury vs. *Green* (1935) 294 U. S. 165, 55 S. Ct. 373, 79 Law. Ed. 834.

Therefore, the Petitioner, The First National Bank of St. Clairsville, Ohio, respectfully submits that the Supreme

Court of the United States has jurisdiction of this appeal by virtue of Section 344 (a) and (b) of Title 28 of the United States Code.

Respectfully submitted,

THORNBURG & LEWIS,
GEORGE THORNBURG,
EARL R. LEWIS,
Attorneys for The First National Bank of St. Clairsville, Ohio, Petitioner, and Appellant in the Supreme Court of the United States,
All of St. Clairsville, Ohio.

APPENDIX "A".

Filed Auditors Office, Belmont County, May 14, 1928. H. G. Finley, County Auditor.

STATEMENT OF RESOURCES AND LIABILITIES OF THE BANK FOR THE YEAR 1928.

(Excerpt from Exhibit marked PX 3.)

TAX NOTICE FOR NATIONAL BANKS FOR 1928.

Forms for Bank Statements, in duplicate, under the provisions of Sections 5407 to 5414, inclusive, of the General Code of Ohio.

Banks or Banking Associations Organized Under the Laws of the United States.

To the Cashier of the First National Bank, St. Clairsville, Ohio:

SIR:

You are hereby required to make out upon the forms herewith, and return to me at my office, at St. Clairsville, in the County of Belmont, Ohio, between the first and second Mondays of May, 1928, a report in Duplicate, under oath, exhibiting in detail the resources and liabilities of the above Bank or Banking Association, at the close of business on the Wednesday next preceding the said second Monday of May, together with a full statement of the names and residences of stockholders therein with the number of shares held by each and the par value of each share. This return must be accompanied by a copy of the report to the Comptroller of Currency of the United States, made next prior to the said second Monday of May.

This report must correspond with the face of the bank's books.

If the bank claims any allowance intended to reduce the amount of capital, surplus fund or undivided profits, as the same is shown by its books, the items must be set forth

in detail stating the reasons therefor. Deductions must not be made from resources or liabilities.

ALL QUESTIONS MUST BE ANSWERED OR REPORT WILL NOT BE ACCEPTED.

Dated May 9th, 1928.

—— ——, Auditor of —— County, Ohio.

Resources.

Loans and Discounts	1,025,760.76
Overdrafts	892.67
U. S. Bonds to secure circulation	150,000.00
U. S. Bonds to secure deposits	
Bonds, Securities, etc., including premium	334,865.02
Due from approved reserve agents	66,419.80
Due from banks and bankers	196,772.08
Real estate	60,408.92
Furniture and fixtures	9,200.00
Checks and other cash items	6,745.04
Exchanges for clearing house	
Paper currency and coin	31,622.72
Due from U. S. Treasurer	7,500.00
Other resources in detail: (Whether entered on books of bank or not)	
Total	1,890,187.01

Liabilities.

Capital stock paid in		$150 000.00
Surplus fund		150 000.00
Undivided profits (See Note)	$79 801.04	
Less current expenses, taxes and interest paid	$30 981.83	
Net undivided profits		48 819.21
National bank notes outstanding		147 300.00
Dividends unpaid		
Individual deposits		1 347 466.11
United States deposits		11 146.05
Due to other national banks		7 187.23
Due to state banks and bankers		
Notes and bills rediscounted		
Bills payable		
Other liabilities in detail:		
Uninv. Trust Funds		28 268.41
Total		$1 890 187.01

Note: This item must include all earnings of the bank to whatsoever account credited, except dividends unpaid. If any special funds arising out of earnings and undivided profits, belonging to the bank, are not included in the general statement, the same must be reported for taxes under undivided profits. Some banks carry funds of the above description in certificates of deposits, and on individual ledgers, etc., and these funds must be returned for taxation.

Real Estate in Ohio

Where Situated		Description			Value		
Counties	Name of Township ***** or Incorporated Village	General Description	No. of Lot	Area Acres 1/100	True or Actual	As Carried on Books of Bank	As Assessed (To be Supplied by County Auditor)
Belmont	St. C. Corp.	Bank Bldg.			47,000.	47,000.	36,100.00
"	Richland Twp.			¼ acre	4,000.	4,160.	3,000.00
"	Flushing Corp.			3/10 A.	3,800.	4,488.92	3,800.00
"	Wheeling Twp.			4 Acres.	4,000.	4,760.	3,000.
	60410						
	45900						
	14510						
		Total in Ohio			58,000	60,408.92	45,900.

I, A. L. Baumgarner, Cashier of The First National Bank, of St. Clairsville, Ohio, do hereby certify that

The amount of its authorized capital stock is	$150,000.
The total number of shares is	1500
The total market value of its shares is	.....
The total actual value (if there is no market value) of its shares is	$347,119.21
The actual value of the furniture and fixtures is	$ 7,500.00
The total amount of the dividends declared during the past year was	$ 18,000.00

The dividend paying periods during the past year were—June 30th and Dec. 31st.

Cashier.

Affidavit.

The State of Ohio, Belmont County, ss.

I, A. L. Baumgarner, Cashier of The First National Bank, of St. Clairsville, Ohio, do solemnly swear that the statements contained in the foregoing report, including the statement of the resources and liabilities, the real estate, the names and residences of the stockholders, the number of shares held by each and the par value and actual value of the shares of said bank at the close of business on the Wednesday next preceding the second Monday of May, 1928 are true and correct.

(s) A. L. Baumgarner, Cashier.

Sworn to and subscribed before me, a Notary Public in and for said County, this 12th day of May, 1928.

(s) John Kovach.

NAMES AND RESIDENCES OF STOCKHOLDERS
and
NUMBER OF SHARES HELD BY EACH.
(Details Omitted.)

OFFICE OF THE AUDITOR
of
BELMONT COUNTY.

St. Clairsville, Ohio, 1928.

To the Tax Commission of Ohio:

I Hereby Certify, That I have fixed the value of the shares of First Nat'l Bank of St. Clairsville, Ohio, for the year 1928, as follows:

1500 shares of a total par value of $100, at	$334 310
From which is to be deducted the value of the real estate in Ohio included in the statement of resources of said bank assessed for taxation for the current year at	$ 45 900
Leaving taxable valuation to be entered on personal property duplicate at	$288 410

(S.) H. G. FINLEY,
Auditor of Belmont County, Ohio.

Received at the County Auditor's Office May 20, 1929.

STATEMENT OF RESOURCES AND LIABILITIES OF THE BANK FOR THE YEAR 1929

(Excerpt from Exhibit marked PX 4)

TAX NOTICE FOR NATIONAL BANKS FOR 1929

Forms for Bank Statements, in duplicate, under the provisions of Sections 5407 to 5414, inclusive, of the General Code of Ohio.

Banks or Banking Associations Organized Under the Laws of the United States

To the Cashier of the First National Bank,
St. Clairsville, Ohio:

SIR: You are hereby required to make out upon the forms herewith, and return to me at my office, at St. Clairsville,

in the County of Belmont, Ohio, between the first and second Mondays of May, 1929, a report in Duplicate, under oath, exhibiting in detail the resources and liabilities of the above Bank or Banking Association, at the close of business on the Wednesday next preceding the said second Monday of May, together with a full statement of the names and residences of stockholders therein with the number of shares held by each and the par value of each share. This return must be accompanied by a copy of the report to the Comptroller of Currency of the United States, made next prior to the said second Monday of May.

This report must correspond with the face of the bank's books.

If the bank claims any allowance intended to reduce the amount of capital, surplus fund or undivided profits, as the same is shown by its books, the items must be set forth in detail stating the reason therefor. Deductions must not be made from resources or liabilities.

ALL QUESTIONS MUST BE ANSWERED OR REPORT WILL NOT BE ACCEPTED

Dated May 8th, 1929. Auditor of Belmont County, Ohio.

Resources

Loans and Discounts	$ 949,145.62
Overdrafts	717.64
U. S. Bonds to secure circulation	150,000.
U. S. Bonds to secure deposits	59,707.39
Bonds, Securities, etc., including premiums	286,849.72
Due from approved reserve agents	57,974.04
Due from banks and bankers	191,718.68
Real estate	65,368.92
Furniture and fixtures	9,200.
Checks and other cash items	848.27
Exchanges for clearing house	
Paper currency and coin	34,943.60
Due from U. S. Treasurer	7,500.
Other resources in detail: (Whether entered on books of bank or not)	
	$ 1,813,973.88

Liabilities

Capital stock paid in		$150,000.
Surplus fund		150.000.
Undivided profits (See Note)	$69,933.06	
Less current expenses, taxes and interest paid	$28,768.16	
Net undivided profits		41,164.90
National bank notes outstanding		150,000.
Dividends unpaid		
Individual deposits		1,224,012.55
United States deposits		11,426.44
Due to other national banks		3,267.01
Due to state banks and bankers		
Notes and bills rediscounted		
Bills payable		55,000.
Other liabilities in detail: Certified checks		4,234.50
Uninvested Trust Funds		24,868.48
Total		$1,813,973.88

Note: This item must include all earnings of the bank to whatsoever account credited, except dividends unpaid. If any special funds arising out of earnings and undivided profits, belonging to the bank, are not included in the general statement, the same must be reported for taxes under undivided profits. Some banks carry funds of the above description in certificates of deposits, and on individual ledgers, etc., and these funds must be returned for taxation.

REAL ESTATE IN OHIO

Where Situated		Description			Value		
Counties	Name of Township ***** or Incorporated Village	General Description	No. of Lot	Area Acres 1/100	True or Actual	As Carried on Books of Bank	As Assessed (To be Supplied by County Auditor)
Belmont	St. Clairsville Corporation	Bank Bldg.	44		47000.	47000.	36100.
Belmont	Richland Twp.			¼ Acre	4000.	4150.	3000.
Belmont	Wheeling Twp.			4 Acres	3000.	4760.	3000.
Belmont	Flushing Twp.			91 Acres	2500.	2500.	3100. 3200
Belmont	Flushing Corp.			3/10 A.	3500.	4488.92	3800.
Belmont	St. Clairsville Corporation		145		3000.	3000.	4570.
		Total in Ohio				$65,898.92	$53,570.00

I, Isaac T. Newlin, Cashier of The First National Bank, of St. Clairsville, Ohio, do hereby certify that

The amount of its authorized capital stock is	$150,000.00
The total number of shares is	1,500.00
The total market value of its shares is	.....
The total actual value (if there is no market value) of its shares is	$341,164.90
The actual value of the furniture and fixtures is	7,500.00
The total amount of the dividends declared during the past year was	15,000.00

The dividend paying periods during the past year were June 30th and Dec. 31st.

(s) Isaac T. Newlin, Cashier.

Affidavit.

The State of Ohio, Belmont County, ss.

I, Isaac T. Newlin, Cashier of The First National Bank, of St. Clairsville, Ohio, do solemnly swear that the statements contained in the foregoing report, including the statement of the resources and liabilities, the real estate, the names and residences of the stockholders, the number of shares held by each and the par value and actual value of the shares of said bank at the close of business on the Wednesday next preceding the second Monday of May, 1929 are true and correct.

(s) Isaac T. Newlin, Cashier.

Sworn to and subscribed before me, a Notary Public in and for said County, this 10th day of May, 1929.

(s) John E. Costine, Notary Public.

REPORT OF THE CONDITION

of

THE FIRST NATIONAL BANK

of

SAINT CLAIRSVILLE, IN THE STATE OF OHIO

At the close of business on March 27th, 1929.

(Details Omitted)

NAMES AND RESIDENCES OF STOCKHOLDERS AND NUMBER OF SHARES HELD BY EACH.

(Details Omitted)

OFFICE OF THE AUDITOR OF BELMONT COUNTY,

St. Clairsville, Ohio, 1929.

To the Tax Commission of Ohio:

I hereby certify, that I have fixed the value of the shares of First National Bank of St. Clairsville, Ohio, for the year 1929, as follows:

1500 shares of a total par value of $150,000, at	$329,830
From which is to be deducted the value of the real estate in Ohio included in the statement of resources of said bank assessed for taxation for the current year at	$ 54,570
Leaving taxable valuation to be entered on personal property duplicate at	$275,260

(S.) H. G. FINLEY,
Auditor of Belmont County, Ohio.

Filed Auditor's Office, Belmont County, May 31, 1930.
H. G. Finley, County Auditor.

STATEMENT OF RESOURCES AND LIABILITIES OF THE BANK FOR THE YEAR 1930.

(Excerpt from Exhibit marked PX 5)

Tax Notice for National Banks for 1930.

Forms for Bank Statements, in duplicate, under the provisions of Sections 5407 to 5414, inclusive, of the General Code of Ohio.

Banks or Banking Associations Organized under the Laws of the United States.

To the Cashier of the First National Bank,
St. Clairsville, Ohio:

SIR: You are hereby required to make out upon the forms herewith, and return to me at my office, at St. Clairsville, in the County of Belmont, Ohio, between the first and second Mondays of May, 1930, a report in Duplicate, under oath, exhibiting in detail the resources and liabilities of the above Bank or Banking Association, at the close of business on the Wednesday next preceding the said second Monday of May, together with a full statement of the names and residences of stockholders therein with the number of shares held by each and the par value of each share. This return must be accompanied by a copy of the report to the Comptroller of Currency of the United States, made next prior to the said second Monday of May.

This report must correspond with the face of the bank's books.

If the bank claims any allowance intended to reduce the amount of capital, surplus fund or undivided profits, as the same is shown by its books, the items must be set forth in detail stating the reason therefor. Deductions must not be made from resources or liabilities.

ALL QUESTIONS MUST BE ANSWERED OR REPORT WILL NOT BE ACCEPTED

Dated May 5, 193—

HOMER G. FINLEY,
Auditor of Belmont County, Ohio.

Resources.

Loans and Discounts		$ 824,228.35
Overdrafts		678.78
U. S. Bonds to secure circulation		150,000.
U. S. Bonds to secure deposits		69,557.39
Bonds, Securities, etc., including premium		281,892.22
Due from approved reserve agents		47,498.45
Due from banks and bankers		147,624.69
Real estate		64,523.92
Furniture and fixtures		9,200
Checks and other cash items		3,451.54
Exchanges for clearing house		
Paper currency and coin		41,644.62
Due from U. S. Treasurer		7,500
Other resources in detail: (Whether entered on books of bank or not)		
Total		$1,647,799.96

Liabilities

Capital stock paid in		$ 150,000.00
Surplus fund		150,000.00
Undivided profits (See Note)	$40,343.31	
Less current expenses, taxes and interest paid	29,491.81	
Net undivided profits		10,851.50
National bank notes outstanding		150,000.
Dividends unpaid		235.
Individual deposits		1,063,307.41
United States deposits		11,713.89
Due to other national banks		1,129.23
Due to state banks and bankers		
Notes and bills rediscounted		
Bills payable		85,000.
Other liabilities in detail:		
Cashier's Checks		531.53
Uninvested Trust Funds		25,031.40
Total		1,647,799.96

NOTE: This item must include all earnings of the bank to whatsoever account credited, except dividends unpaid. If any special funds arising out of earnings and undivided profits, belonging to the bank, are not included in the general statement, the same must be reported for taxes under undivided profits. Some banks carry funds of the above description in certificates of deposits, and on individual ledgers, etc., and these funds must be returned for taxation.

Where Situated		Description				Value	
Counties	Name of Township ***** or Incorporated Village	General Description	No. of Lot	Area Acres 1/100	True or Actual	As Carried on Books of Bank	As Assessed (To be Supplied by County Auditor)
Belmont	Flushing Corp.	Sec. 15, Tp. 9, R. 5		3/10 A		$4488.92	3800.00
Belmont	Union Twp.	Lafferty Farm Addition—	14–15			1500.00	880.00
"	Richland Twp.	N. W. ¼ Sec. 13–Tp. 5—R. 3–(Glencoe)	¼ A.			4160.00	3000.00
"	St. C. Corp.	Part Lot	145			1475.00	4570.00
"	Richland Twp.	Clark's 2nd Add. Glencoe	30			900.00	660.00
"	Kirkwood Twp.	Sec. 14 & 15		101 A		4500.00	4500.00
"	St. C. Corp.		44	C Pr.			34780.00
"	St. C. Corp.		44	E Pr.			1320.00
		Total in Ohio				$64520.00	53510.

I, Isaac T. Newlin, Cashier of The First National Bank of St. Clairsville, Ohio, do hereby certify that

The amount of its authorized capital stock is	$150,000.00
The total number of shares is	1,500
The total market value of its shares is	.....
The total actual value (if there is no market value) of its shares is	$310,851.50
The actual value of the furniture and fixtures is	7,500.00
The total amount of the dividends declared during the past year was	$15,000.00

The dividend paying periods during the past year were—June 30th, and Dec. 31st.

Cashier.

Affidavit

THE STATE OF OHIO,
Belmont County, ss:

I, Isaac T. Newlin, Cashier of The First National Bank, of St. Clairsville, Ohio, do solemnly swear that the statements contained in the foregoing report, including the statement of the resources and liabilities, the real estate, the names and residences of the stockholders, the number of shares held by each and the par value and actual value of the shares of said bank at the close of business on the Wednesday next preceding the second Monday of May, 193— are true and correct.

(S.) ISAAC T. NEWLIN,
Cashier.

Sworn to and subscribed before me, a Notary Public in and for said County, this 29th day of May, 1930.

(S.) JOHN KOVACH.

REPORT OF THE CONDITION OF THE FIRST NATIONAL BANK OF ST. CLAIRSVILLE IN THE STATE OF OHIO.

At the Close of Business on March 27, 1930.

(Details Omitted.)

NAMES AND RESIDENCES OF STOCKHOLDERS AND NUMBER OF SHARES HELD BY EACH.

(Details Omitted.)

OFFICE OF THE AUDITOR OF BELMONT COUNTY

St. Clairsville, Ohio, 1930.

To the Tax Commission of Ohio:

I Hereby Certify, That I have fixed the value of the shares of First National Bank of St. Clairsville, Ohio, for the year 1930, as follows:

1500 shares of a total par value of $100.00, at	$309,040
From which is to be deducted the value of the real estate in Ohio included in the statement of resources of said bank assessed for taxation for the current year at	62,710
Leaving taxable valuation to be entered on personal property duplicate at	$246,330

(S.) H. G. FINLEY,
Auditor of Belmont County, Ohio.

COPY BOUND VERTICALLY

APPENDIX "E".

PX13

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TREASURER'S DUPLICATE OF TAXES ASSESSED ON PERSONAL PROPERTY IN ST. CLAIRSVILLE VILLAGE, BELMONT COUNTY, OHIO, FOR THE YEAR 1928

Receipt No.	Owner's Name	Value as Equalized by Assessor	Total Tax Due Dec., 1928	Total Tax 1928 and Delinquent Tax 1927	Tax of Dec. 1928 not paid	Total Tax and Penalty Due June, 1929
			Dols. cts.	Dols. cts.	Dols. cts.	Dols. cts.
		Banks				
4103	The First National Bank	288410	3576.28	7152.56	3576.28	7152.56

(NOTE: Headings of blank columns omitted)

PX14

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TREASURER'S DUPLICATE OF TAXES ASSESSED ON PERSONAL PROPERTY IN ST. CLAIRSVILLE VILLAGE, BELMONT COUNTY, OHIO, FOR THE YEAR 1929

Receipt No.	Owner's Name	Value as Equalized by Assessor	Total Tax Due Dec., 1929	Remarks	Total Tax 1929 and Delinquent Tax 1928	Tax of Dec. 1929 not paid	Penalty on Dec. Tax	Total Tax and Penalty Due June, 1930
			Dols. cts.		Dols. cts.	Dols. cts.	Dols. cts.	Dols. cts.
		Banks						
4084	The First National Bank	275260	3716.01	Delinquent	7432.02	3716.01	743.20	8175.22

(Continuation from righthand margin of page)

Remarks
Delinquent

TREASURER'S DUPLICATE OF TAXES ASSESSED ON PERSONAL PROPERTY IN ST. CLAIRSVILLE VILLAGE, BELMONT COUNTY, OHIO, FOR THE YEAR 1930

Receipt No.	Owner's Name	Value as Equalized by Assessor	One-Half Tax 1930	Total Tax Due Dec., 1930	Remarks	Total Tax 1930 and Delinquent Tax 1929	Tax of Dec. 1930 not paid	Penalty on Dec. Tax
			Dols. cts.	Dols. cts.		Dols. cts.	Dols. cts.	Dols. cts.
			Banks					
4059	The First National	246330	3892.01	3892.01	Delinquent	7784.02	3892.01	778.40

(Continuation from righthand margin of page)

Total Tax and Penalty Due June, 1931	Remarks		
Dols. cts.			
8562.42	Delinquent	3	8562.42

(NOTE: Headings of blank columns omitted)

NOV 10 1943
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 422

THE FIRST NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

Appellant,

vs.

HOMER J. FINDLEY AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR AS AUDITOR OF BELMONT COUNTY, OHIO,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF APPELLANT ANSWERING BRIEF OF APPELLEES IN OPPOSITION TO THE APPEAL TO THIS COURT.

GEORGE THORNBURG,
EARL R. LEWIS,
Counsel for Appellant.

THORNBURG & LEWIS,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 422

THE FIRST NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

Appellant,

vs.

HOMER J. FINDLEY AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR AS AUDITOR OF BELMONT COUNTY, OHIO,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

BRIEF OF APPELLANT ANSWERING BRIEF OF APPELLEES IN OPPOSITION TO THE APPEAL TO THIS COURT.

Facts of the Case.

The County Auditor of Belmont County, Ohio, the assessing officer under Ohio Law, listed and assessed taxes in the name of and against Appellant, The First National Bank of St. Clairsville, Ohio, on the County Auditor's Tax List and the County Treasurer's Tax Duplicate:

For the year 1928 in the sum of $288,410.00
For the year 1929 in the sum of 275,260.00
For the year 1930 in the sum of 246,330.00

The tax, as entered on the Auditor's Tax List and the Treasurer's Tax Duplicate for the year 1929, as an example, in its pertinent parts, is as follows:

"Owner's Name	Value as Equalized by Assessor	Total Tax Due Dec., 1929	Total Tax 1929 and Delinquent Tax 1928	Penalty on December Tax
The First National Bank.....	275,260.	3716.01	7432.02	743.20"

The assessments for the years 1928 and 1930 were exactly the same, except for differences in valuation and the amount of the tax and penalty.

These taxes were arrived at by computing the value of the capital, surplus and undivided profits of the bank, excluding real estate, and applying thereto the tax rate for each of the years in question.

Believing these taxes to be illegal because they were taxes against the Bank on its net capital, surplus and undivided profits, after deducting real estate, instead of taxes against the shareholders on the value of their shares, and, therefore, in violation of Section 5219, Revised Statutes of the United States, and Section 1 of the Fourteenth Amendment to the Constitution of the United States, Appellant brought a suit in each of the years in question in the Common Pleas Court of Belmont County, Ohio, the trial court, to have said taxes decreed null and void and to enjoin the collection of the same.

When said taxes became delinquent, a penalty was imposed by the County Auditor and thereupon a statement of such delinquent taxes was filed with the County Recorder under a statute which thereby gave the county a lien on the real estate of the Appellant.

The suits to declare said taxes null and void and to enjoin their collection were commenced, and later the three suits were consolidated into this one action by order of the Common Pleas Court of Belmont County, Ohio, the trial

court, which court issued an injunction restraining the collection of said taxes and cancelled the lien on the real estate of Appellant. Thereupon the case was appealed to the Court of Appeals of Belmont County, Ohio, which enjoined Appellees from collecting said taxes and penalties and ordered the liens on the real estate of Appellant to be cancelled of record. Thereupon the case was certified by the Court of Appeals to the Supreme Court of Ohio, which Court sustained that portion of the judgment of the Court of Appeals which cancelled the lien on the real estate but reversed that portion of the judgment which enjoined Appellees from collecting the tax and held the tax to be a valid tax. (*Union Savings Bank* v. *Pancoast, Treasurer, et al.*, 142 Ohio State 6.)

Appellant, in its Third Amended Petition, upon which the case was heard, charged that the taxes in question:

> "were contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to-wit:
>
> "(a) There is no Statute of Ohio, nor of the United States of America, authorizing or permitting the auditor to make said assessments of taxes against plaintiff.
>
> "(b) * * *.
>
> "(c) The Statutes of Ohio under authority of which said auditor and treasurer pretend to have assessed said taxes against plaintiff and to have the right to collect the same from plaintiff, respectively, are in violation of Section 5219, Revised Statutes of the United States of America, now Section 548 of Title 12 of the United States Code, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America * * * ".

ARGUMENT.

1. National banks are taxable by State authority only in the manner Congress permits by Federal Statute (McCulloch v. Maryland, 4 Wheat., 316; Owensboro National Bank v. Owensboro (1899), 173 U. S. 664, 43 L. Ed. 850).

> "Section 5219, Revised Statutes, prescribes the full measure of the power of the several states to impose taxes upon national banking associations or their stockholders."—*First National Bank of Gulfport, Miss.* v. *Adams, Revenue Agent* (1922), 258 U. S. 362, 66 L. Ed. 661, 42 S. Ct. 323, overruling 123 Miss. 279, 85 So. 308.

Section 5219 of the Revised Statutes (Section 548, Title 12, United States Code) provides that:

> "The legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several states may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
>
> > "1. (a) The imposition by any state of any one of the above four forms of taxation shall be in lieu of the others, * * *."

Revised Statutes, Section 5219, is set forth in full in "Addendum No. 1" hereto.

2. The State of Ohio, pursuant to the authority granted by the Federal Statute (Section 5219, R. S.), has elected to tax the shares of the stockholders.

> General Code, Section 5408: "All the shares of the stockholders in an incorporated bank or banking association located in this state, incorporated or organized

under the laws of the state or of the United States * * * shall be listed at the true value in money and taxed only in the city, ward or village where such bank is located."—(Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition).

General Code, Section 5408, in full, to Section 5414, inclusive, and General Code 5672 and 5673 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition), all dealing with the taxation of banks, are set forth in "Addendum No. 2" hereof; and the pertinent tax statutes of Ohio of general application to all property, including bank shares, being General Code, Sections 2583, 2585, 5367 and 5579 (Throckmorton's Annotated Code of Ohio, Baldwin's Revision, 1930 Edition), in their pertinent parts, are set forth in "Addendum No. 3" hereof.*

The Supreme Court of Ohio held that:

"2. The provisions of Section 5672, General Code, as in effect prior to January 1, 1931, making the taxes assessed on shares of stock in a bank or banking association a lien on such shares until paid and imposing upon such bank or banking association the duty to collect the taxes due upon its shares of stock from the owners thereof and pay the same to the treasurer of the county in which such bank or banking association is located and imposing upon any bank or banking association failing to pay such taxes a liability by way of penalty for the gross amount of taxes due from all the owners of the shares of stock do not impose a tax on the bank and are not violative of the provisions of Section 548 of Title 12 of the Code of Laws of the United States (Section 5219, Revised Statutes of the United States) prescribing the manner in which such taxes affecting national banks may be levied and assessed."

---

* Clerk's Note—Addenda "1", "2" and "3" are printed as Addenda to the Appellant's Brief in No. 421 and are not duplicated.

The Supreme Court of Ohio also held, in paragraph number 3 of the Syllabus, that the tax was placed:

> "on the tax duplicate against the bank instead of the respective owners of the shares of stock"

but that it

> "does not constitute the same a lien on the real estate of the bank."

The Supreme Court of Ohio also held that:

> "4. The apportionment of the aggregate amount of taxes due on bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of a bank to collect the taxes due upon its shares of stock and pay same to the treasurer of the county by the provisions of Section 5672, General Code."

3. Questions presented on this appeal.

There is thus drawn in question:

A. *The validity of the Bank Tax Statutes of Ohio, as applied by the County Auditor and County Treasurer and as construed by the Supreme Court of Ohio, under the claim that the same are contrary to and in violation of Section 5219, Revised Statutes of the United States, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.* And the decision of the Supreme Court of Ohio sustained the Ohio Statutes as construed by the County Auditor and the County Treasurer.

B. *And there is also involved in this appeal the validity of the taxes found by the Supreme Court of Ohio to be assessed against Appellant instead of against the stockholders of Appellant on the value of their shares.*

And these questions involved in this appeal are not solely the validity of taxes or tax assessments but also the

validity of the Ohio Statute under authority of which the County Auditor pretended to act. Those questions were presented in the Court of Common Pleas, the trial court, and also in the Court of Appeals and in the Supreme Court of Ohio, and are now raised in this case on appeal.

4. Jurisdiction of this Court to entertain this appeal.

A. *Jurisdiction to entertain an appeal from the decision of a state court on the ground that a State Statute, as construed, is repugnant to the Constitution of the United States. Colorado National Bank of Denver* v. *Bedford* (1940), 310 U. S. 41. The language of the Syllabus in that case is as follows:

> "1. This case is appealable under Judicial Code, Section 237(a) because a state statute affecting national banks was upheld by a state court over the objection of conflict with the Federal Law and Constitution."

To the same effect, see *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664.

In the case of *Indiana, Ex Rel., Anderson* v. *Brand, Trustee*, (1938), 303 U. S. 98, this Court held as follows:

> "1. Where a state court does not decide a cause upon an independent state ground but deeming a Federal question to be before it actually entertains and decides that question adversely to the Federal right asserted, this court has jurisdiction to review the judgment if final."

This Court has also held that:

> "In the exercise of the appellate jurisdiction of the Federal Supreme Court over state courts, the former court is bound by the construction of a state law adopted by its court of last resort. But the Federal Supreme Court, while bound by the construction of a state statute adopted by the state court of last resort,

is not concluded by its reasoning but must exercise independent judgment when called upon to determine the Federal question whether the action, as construed and applied, is repugnant to the restrictions of the Federal Constitution."—*Ward* v. *Krinsky* (1922), 259 U. S. 502, 42 S. Ct. 529, 66 L. Ed. 1033, 28 A. L. R. 1207.

"Where the validity of a statute of California, as construed by the California courts, was drawn in question on the ground of its being repugnant to the Constitution of the United States, a judgment of the Supreme Court of California was properly before the United States Supreme Court on appeal."—*Standard Oil Company of California* v. *Johnson* (1942), 62 S. Ct. 1168, 86 L. Ed. 1611.

"The United States Supreme Court, in passing on constitutional questions regards substance and the statute attacked must be tested by its operation and effect."—*Near* v. *The State of Minnesota* (1931), 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357.

B. *Jurisdiction to entertain an appeal from the decision of a state court on the ground that a State Statute, as construed, is repugnant to a Statute of the United States.*

"The United States Supreme Court had jurisdiction of writ of error to review a suit in the state court where the validity of a state statute providing for a tax on national bank shares is drawn in question as being repugnant to Section 548 of Title 12, United States Code (Revised Statutes, Section 5219)."—First National Bank of Guthrie *vs.* Anderson (1926), 269 U. S. 341, 46 S. Ct. 135, 70 L. Ed. 295.

Characterization of a tax by a state court is not binding where a Federal right is concerned.—Carpenter *vs.* Shaw, 280 U. S. 363, 50 S. Ct. 121, 74 L. Ed. 478.

Appeal may be had to the Supreme Court of the United States where a state statute, as construed and applied to a particular transaction, is repugnant to the Constitution or Laws of the United States.—Dahnke-

Walker Co. *vs.* Bondurant (1921), 257 U. S. 282, 42 S. Ct. 106, 66 L. Ed. 239.

Appellate jurisdiction of the United States Supreme Court has been invoked and exercised for the protection of a Federal claim of right under the Statutes of the United States, such as the National Banking Law.—McCormick *vs.* Market Bank (1897), 165 U. S. 338, 17 S. Ct. 433, 41 L. Ed. 817.

5. Various contentions of appellees answered.

A. *Bank Tax Statutes of Ohio have been amended.*

While it is true that the Ohio Bank Tax Statutes involved in this case have been amended, yet they still provide for the taxation of bank shares under the designation of:

> "Investments * * * and other intangible property" —General Code, Section 5328-1 (Throckmorton's Ohio Code Annotated, 1940, Baldwin's Certified Revision).

The case of *District of Columbia* v. *Sweeney*, 310 U. S. 631, cited by Appellees as authority for the proposition that this Court will not entertain jurisdiction because the Statutes in question have been amended is not applicable to the circumstances in this case because the Statute in question in that case had been repealed and was not of public importance and of the great general interest which attaches to statutes affecting the taxation of national banks. In this connection it should also be noted that twenty-nine states, including Ohio, still have statutes authorizing the taxation of national bank shares.

B. *Claim that "Federal questions presented by the pleadings are not open to consideration by this Court."*

This claim has been answered above but at this point it is sufficient to say that this Court, comparatively recently, held to the contrary in the case of *Colorado National Bank*

of Denver v. *Bedford*, 310 U. S. 41 (supra), in which case this Court held, as stated in the Syllabus:

> "1. This case is appealable under Judicial Code, Section 237(a) because a state statute affecting national banks was upheld by a state court over the objection of conflict with the Federal law and the Constitution."

That is precisely the situation presented by the record in this case.

C. *Appellees' argument concerning allegation of discriminatory taxation.*

Much of the argument contained on pages 5, 6, 7, 8, 9 and 10 of Appellees' Brief relates to the allegation of the Third Amended Petition concerning discriminatory taxation, but no evidence was introduced under that allegation and, therefore, the same has never been an issue in any one of the three state courts and, of course, is not an issue in this Court.

D. *Claim of "no substantial Federal question."*

Appellees claim that:

> "no substantial Federal question is tendered by this appeal."

The question tendered by this appeal may be stated in a number of different ways but, in essence, it is whether a State Statute of Ohio, construed by the Supreme Court of that state to authorize the assessment of a tax in solido in the name of and against a national bank, based upon the bank's net capital, surplus and undivided profits, excluding its real estate, is authorized by the Federal Statute (Section 5219, Revised Statutes); and whether a duty can lawfully be imposed upon such bank to collect undetermined amounts from its shareholders equal to the total tax assessed in solido against the bank and pay the same to the treasurer of the county in which the bank is located; and whether, if

the bank fails to collect such tax so assessed against it, it then becomes liable by way of penalty imposed by the State Statute to pay the gross amount of said tax so assessed plus $100.00 a day penalty for delay in such payment.

These are the questions presented by the decision of the Supreme Court of Ohio from which this appeal is prosecuted and we believe the same are, from their very nature, Federal questions of substance, not only of vital interest to the litigants in this case, but equally of interest to national banks and state taxing authorities in all of those twenty-nine states which now tax the shares of national banks.

We believe that the questions here presented are substantial particularly because Section 5219, Revised Statutes, was amended in 1923, completely re-arranged in form to include the substance of the original statute and previous amendments thereof, plus many, but not all, interpretations placed thereon by this Court down through the intervening years, and amended again in 1926; and because since these radical changes of form in the statute by the amendments of 1923 and 1926 there have been but very few decisions of this Court applying such Statute as so amended.

For these reasons we believe the record does present on this appeal Federal questions of real substance which should be decided by this Court as a guide for national banks and state taxing authorities in the twenty-nine states that tax the shares of national banks.

In this connection the case of *Owensboro National Bank* v. *Owensboro* (1899), 173 U. S. 664, is most pertinent, as is also the case of *First National Bank of Gulfport, Mississippi,* v. *Adams, Revenue Agent* (1922), 258 U. S. 362, in which case it is held that:

> "1. Where the validity of a tax assessment by state officers is properly challenged and the matter comes before the Federal Supreme Court, that Court must

determine the effect of the thing actually done. What might have been done under the local statute is not controlling.

"2. A state tax assessed to a national bank, measured by the value of the bank's capital stock, surplus, undivided profits and other personal property, is not equivalent to one upon the shareholders in respect of their shares, and such tax is, therefore, invalid under United States Revised Statutes, Section 5219 (Title 12, Section 548, United States Code) which only permits the state, when assessing taxes, to include national bank shares in the valuation of the personal property of the owner or holder."

E. *Decision of Ohio Supreme Court based on the case of First National Bank of Aberdeen v. Chehallis County (1897), 166 U. S. 440.*

The Supreme Court of Ohio based its decision upon the last above-mentioned case but in so doing it overlooked the fact that in that case there were two statutes of the State of Washington involved, Section 21 and Section 23 of the Laws of Washington. Section 21 provided, in its pertinent parts that

"Every * * * corporation * * * carrying on a general banking business in this state, whether the same has been organized under the banking laws of this state or the United States, * * * shall be assessed and taxed in the county * * * where such bank * * * is located, and not elsewhere, in the following manner: Annually at such times as provided for listing property for taxation every such bank * * * shall, by its accounting officer, furnish the county * * * assessor a statement verified by oath, giving the amount of paid up capital stock, the amount of surplus or reserved fund and the amount of undivided profits of such bank. * * * The aggregate amount of capital, surplus and undivided

profits shall be assessed and taxed as other like property in the state is assessed and taxed. * * *"

The comment of the Court upon this section was that:

"If this section stood alone, there might be ground for the contention that it contemplates taxation of the capital of the bank. But Section 23 of the Statutes provides that 'each bank and banking association shall be liable to pay any taxes assessed against them *as the agent of each of its shareholders, owners or owner,* under the provisions of this Act and may pay the same out of their individual profit account or charge the same to their expense account or to the accounts of such shareholders, owners or owner in proportion to their ownership' " (Italics ours).

This, of course, is a vastly different situation from that presented by the case at bar. Section 23 of the Statutes of Washington authorized the assessment to be made on the bank's capital, surplus and undivided profits in the name of the bank; but, by Section 23 of the Act, it provided that such an assessment is made in the name of the bank:

"as the agent of each of its shareholders."

The Ohio Statutes, on the contrary, contain no provision authorizing the assessment of the tax in the name of and against the Bank. The only tax authorized by the Ohio Statutes is a tax on:

"the shares of the stockholders";

consequently, the Supreme Court of Ohio was in error in holding that the case of *First National Bank of Aberdeen* v. *Chehallis County,* 166 U. S. 440, is decisive of the issues in this case.

Perhaps the fact that Section 5219, Revised Statutes, has been changed in form, although not in substance, since the

decisions in the cases of *Owensboro National Bank* v. *Owensboro* (1899), 173 U. S. 664 (*supra*), and *First National Bank of Gulfport, Miss.*, v. *Adams, Revenue Agent* (1922), 258 U. S. 362 (*supra*), led the Supreme Court of Ohio to ignore the holdings in the cases last above cited.

We believe the true rule applicable here is that stated by this Court in the case of *Schuylkill Trust Co.* v. *Pennsylvania* (1935), 296 U. S. 102, in which case it was held, to quote from the Syllabus:

> "1. A corporation made liable in the first instance for a state tax on its shares which it may pay from its funds or collect from the shareholders but for which no lien is given either to the corporation or to the state has a standing to contest the validity of the tax.
>
> "2. Much weight attaches to the characterization of a state tax or the interpretation of a state law by the State Supreme Court, but where a Federal question is involved, this Court must determine for itself the true nature of the tax by ascertaining its operation and effect."

F. *Appellees' contention that Congress intended assessment of tax against the bank "as agent of its shareholders."*

The argument is made that because this Court has held that Congress did not intend by the provisions of Section 5219, Revised Statutes, to prescribe to the states the method by which the tax should be collected (see *First National Bank* v. *Kentucky*, 76 U. S. 353 at 363; *Tappan* v. *Merchants National Bank*, 86 U. S. 490 at 505) or the place where the tax should be imposed (*Covington* v. *First National Bank*, 198 U. S. 100 at 112) or the method of collection and the appointment of the Bank as agent to return the shares of the shareholders for taxation and, as agent, to collect the tax; that, therefore, the Statute authorized

the states to make the Bank the agent of the shareholders for assessment of the taxes as well.

This, we submit, is an erroneous conclusion because if such had been the intention of Congress, it would have amended Revised Statutes, Section 5219, in 1923 and 1926 to unequivocally express such an intention. The Supreme Court of the United States had, years ago, held, in the case of *First National Bank of Aberdeen* v. *Chehallis County* (1897), 166 U. S. 440, that a state statute which made the bank the agent of the stockholders for assessment of a tax in the bank's name was legal; yet, notwithstanding that fact, when Congress amended Revised Statutes, Section 5219, it did not include such a provision and certainly the Statutes of Ohio enacted pursuant to the authority of Section 5219, Revised Statutes, do not include such a provision. There being no such provision in the State Laws of Ohio, the Supreme Court of Ohio was in error in relying upon the authority of the case of *First National Bank of Aberdeen* v. *Chehallis County* (*supra*) and this, of course, presents a Federal question not only of substance and of the nature which this Court is authorized to take jurisdiction but one which this Court should decide in the interest of the national banks and State taxing authorities in the twenty-nine States which tax the shares of national banks.

In summary, it should be said that the questions here presented not only deal with the validity of the tax and its assessment, but also raise and deal with the question of the validity of the State Statute of Ohio under which the tax was assessed because the same, as interpreted and applied, is repugnant to Section 5219 of the Revised Statutes and Section 1 of the Fourteenth Amendment to the Constitution of the United States. It should also be pointed out that the whole policy as well as the provisions of the laws of Ohio with respect to the assessment of taxes, re-

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quire that they be assessed to the owners thereof and such is shown to be the fact by the form used by the County Auditor in assessing the tax, which contains a column headed "Owner."

Respectfully submitted,

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(8734)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 422

THE FIRST NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

Appellant,

vs.

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT OPPOSING JURISDICTION.

ROSS MICHENER,
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Belmont County, Ohio;
A. G. LANCIONE,
Ass't Prosecuting Attorney,
Belmont County, Ohio;
C. C. SEDGWICH,
Ass't Prosecuting Attorney,
Belmont County, Ohio,
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IN THE SUPREME COURT OF THE STATE OF OHIO

Cause No. 29199

THE FIRST NATIONAL BANK OF ST. CLAIRSVILLE, OHIO,

Plaintiff-Appellee,

vs.

HOMER J. FINDLEY, AS TREASURER OF BELMONT COUNTY, OHIO, AND E. E. TAYLOR, AS AUDITOR OF BELMONT COUNTY, OHIO,

Defendants-Appellants.

BRIEF IN OPPOSITION TO THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

Summary of Argument in Opposition to the Appeal.

I. Each of the Ohio statutes involved in this litigation has been substantially amended pursuant to the 1929 amendment to the Constitution of Ohio, which completely revamped the system (effective January 1, 1931) of taxing personal property within the state. Questions arising under laws no longer in effect are not of sufficient public importance to require the consideration of this court.

II. No party having more than a nominal interest prosecutes this appeal. The real party in interest is not before the court. Appellant was denied a license to continue in

the banking business on and after March 6, 1933, pursuant to proclamation of the President and the National Bank Conservation Act (Title 12, USC, sec. 202, U. S. C., passed March 9, 1933) and all of its assets were transferred during the course of this litigation either to a new bank of similar name or to liquidating trustees, neither of whom is a party to the action or to this appeal.

III. All elements of alleged discrimination claimed in the pleadings to conflict with either the constitution or statutes of the United States were abandoned by appellant before the case reached the Supreme Court of Ohio. Consequently, the only federal questions of substance presented by the pleadings do not merit consideration. They are now beyond review by this court.

IV. The federal question, if any is tendered by this appeal, is not substantial. Moreover the asserted denial of any right or privilege accruing under favor of either the constitution or statutes of the United States is more fanciful than real.

V. The determination of the Ohio Supreme Court that the statutes of Ohio imposing the taxes in question are not violative of Section 548, Title 12, United States Code, is not in conflict with any determination of this court.

Introduction to Argument.

An appeal is prosecuted from a judgment of the Supreme Court of Ohio, rendered June 30, 1943, reversing in part and affirming in part a decree of the Court of Appeals for the Seventh District of Ohio, within and for Belmont County, which enjoined the collection of taxes on the bank's shares of stock. The opinion of the court is reported under the title of Union Savings Bank *vs.* Pancoast, Treasurer, in 142 Ohio State, 6.

The parties appeared in the Ohio court as in the above caption. They occupy the reverse of that position with respect to this appeal and are herein designated as they appear in this court.

Having stated the question presented in each of the three cases decided as being:

> Were the taxes in question assessed on the shares of stock of the several banks or upon the property of the banks?

the Supreme Court of Ohio construed the Ohio taxation statutes applicable alike to state and national banks. By the judgment from which this appeal is sought it determined that the assailed taxes are imposed upon the shares of the bank and not upon either the bank or its property, that the collective assessment of all the shares and the entry on the tax duplicate, opposite the name of the bank, of the total amount of taxes due on the shares, collectively instead of distributively in the names of the respective owners of the shares, is not violative of Section 548, Title 12, United States Code; that the entry of the levy of taxes on the tax duplicate in the name of the bank does not constitute the same a lien on the real estate of the bank; and that the apportionment of the aggregate amount of taxes due on the bank shares among the respective owners thereof is not a prerequisite to the enforcement of the liability of the bank to collect the taxes due upon the shares of stock and pay same to the treasurer of the county. Accordingly, it was ordered that the judgment of the Court of Appeals "insofar as said decree orders that the pretended liens against the real estate of the appellee, be cancelled of record * * * and insofar as the court renders judgment for appellant on the second cause of action be * * * affirmed and * * * that in all other respects the judgment of the said Court of Appeals be * * * reversed and final judgment rendered in favor of appellants for the reasons stated

in the opinion rendered in this case". (Appellant's Statement of Jurisdiction, pp. 15-16, pp. 56-64.)

From the foregoing, it clearly appears that the assertions contained in paragraphs designated 5 (2), (3), (5), (6), (7) and (10) of appellant's Petition on Appeal (pages 3-10), Assignment of Errors (pages 1-8) and Statement of Jurisdiction (pages 2-6) to the effect that the taxes in controversy were "assessed against the bank" and that said taxes were assessed "on the net capital, surplus and undivided profits of the bank, excluding real estate" are, and each of them is, unsupported by either the court's judgment or opinion. They are assertions, not of what the court decided but of what appellants vigorously endeavored to have decided. They spring from the abortive attempt to induce the Ohio court to decide otherwise under the influence of (1899) *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, and (1922) *First National Bank of Gulfport* v. *Adams,* 258 U. S. 362, cases which the court respectfully considered inapposite. Similarly lacking in sanction are appellant's conclusions that the court's judgment requires the bank "to collect from its individual shareholders undetermined sums", requires the bank "to compute the amount of the taxes due from each shareholder and then to collect the same and pay the amount thereof to the county treasurer", and imposes upon the bank "the obligation to pay the total amount of said taxes * * * by way of penalty * * * before the same became delinquent".

Argument in Opposition to Taking Jurisdiction.

I.

The Ohio Statutes Involved Were Substantially Amended During the Course of This Litigation.

After the three actions consolidated into the instant case (R., p. 27) had been instituted, each of the Ohio statutes in-

volved herein was substantially amended, pursuant to the 1929 amendment of Article XII, Section 2, of the constitution of Ohio (effective January 1, 1931). This amendment abrogated the taxation of bank shares and all other personal property at their true value in money and substituted for the uniform rule the taxation of such property according to its classification. The resulting legislation (114 Ohio Laws, 714) abolished the need for and purpose to be served by tax lists or duplicates in the process of collecting taxes on bank shares as well as on other personal property.

The taxes here involved are for the three years next preceding the effective date of these constitutional and statutory amendments. The asserted invalidity of the taxes in controversy having been based upon the manner in which the assessment was entered upon the tax lists and duplicates currently in use and the requirement of such tax rolls having been abolished by the amendatory statutes, the effect of any pronouncement this court may make in this case would be correspondingly limited. As this court determined in (1939), *District of Columbia* v. *Sweeney*, 310 U. S. 631, questions arising under actions which have expired or have been repealed are not of sufficient public importance to require the consideration of the court.

II.

Appellant Has Only a Nominal Interest in This Appeal; No Real Party in Interest Is Before the Court.

The pleadings hereinafter recited disclose that the real party in interest is not a party to the record or to this appeal. Appellant is a corporation possessed of nothing more substantial than its continuance as a legal entity. All of its assets were transferred before the three original actions were consolidated to either a new bank or to three liquidating trustees, in conseqeunce of its inability to qualify for a

license to continue operating as a national bank, pursuant to the Bank Conservation Act (Title 12, Section 202, United States Code, passed March 9, 1933). Appellant has not subsequently had any legal or beneficial interest in the assets so transferred; those deemed acceptable for banking purposes were acquired by the new bank and those deemed unacceptable for such purpose passed to the trustees for liquidation on behalf of appellant's depositors and other creditors.

Neither the trustees nor the new bank being a party to the action or to this appeal, and appellant being only nominally interested, the appeal was improvidently allowed.

(1894) *Inglehart* v. *Stansbury*, 151 U. S. 68;

(1930) *Davis* v. *Preston*, 280 U. S. 406.

III.

All Claims of Discrimination Having Been Abandoned by Appellant, Federal Questions Presented by the Pleadings Are Not Open to Consideration by This Court.

Appellant having recited in its Statement of Jurisdiction only such parts of the pleadings as give color to the asserted federal question, a review of its third amended petition (R., pp. 1-15) is pertinent. Scrutiny of it will reveal that the only federal questions of substance presented by the pleadings were abandoned before the case reached the Supreme Court of Ohio.

The initial allegation of the third amended petition is that appellant prosecutes the suit "in its own behalf and for and on behalf of its stockholders having a common interest with it." Next after reciting its corporate and business status under Federal statutes, the capacity of defendants, its compliance with the requirement of section 5410, General Code of Ohio (cf. 12 U. S. C., sec. 62) by keeping open for inspection a list of the names, residences and shares of its stock-

holders, that it had made on behalf of its shareholders the annual tax returns as required by section 5411, General Code of Ohio, and the amount of its capital stock, surplus and undivided profits, after deducting the value of its real estate as shown by said reports, appellant alleged:

> "The said auditor * * * attempted to impose upon plaintiff, by levying and assessing against plaintiff" * * * the said taxes, "which amounts were * * * placed against plaintiff upon the tax duplicates"; that the auditor "did not * * * list nor assess against the owners of the shares * * * taxes upon their respective shares in any amount * * *, and did not * * * place on said tax duplicates * * * the value of the shares of capital stock of plaintiff in the names of the respective owners of such shares of stock"; that "defendants filed said pretended assessments and pretended levy in the office of the recorder * * * for a lien against * * * real estate standing of record in the name of plaintiff"; and that "by reason of the foregoing the pretended assessment of said taxes against plaintiff by said auditor of said Belmont county, Ohio, and threatened collection thereof from plaintiff by said treasurer of Belmont county, Ohio, are and at all times herein stated were, contrary to law and in violation of plaintiff's legal and constitutional rights in the following respects, to wit:
>
> "(a) There is no statute of Ohio nor of the United States of America authorizing or permitting the auditor to make said assessments of taxes against plaintiff.
>
> "(b) Said taxes were assessed against plaintiff at a greater rate than was assessed upon other monied capital, which during all the times mentioned herein came into actual and direct competition in substantial amounts with the business of plaintiff and of the other national banks of Belmont county, Ohio, contrary to and in violation of Section 5219 of the Revised Statutes of the United States of America, now Section 548 of Title 12 of the United States Code and in violation of Section 1

of the Fourteenth Amendment to the Constitution of the United States of America and also in violation of Section 2 of Article 12 of the Constitution of Ohio in effect prior to January 1, 1931.

"(c) The statutes of Ohio under authority of which said auditor and treasurer pretend to have assessed said taxes against plaintiff and to have the right to collect the same from plaintiff, respectively, are in violation of Section 5219 of the Revised Statutes of the United States of America now Section 548 of Title 12 of the United States Code and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and also in violation of Section 2 of Article 12 of the Constitution of Ohio in effect prior to January, 1931, because the same authorize the taxation of the shares of plaintiff and all other national banks of Belmont county at their true value in money without deductions of any kind whatsoever, except as to real estate, while allowing deductions of the debts of the shareholders from the value of shares of building and loan companies and associations directly competing with the business of plaintiff and of said other national banks, and, under certain circumstances, exempt such shares entirely from taxation as hereinbefore set forth, thus discriminating against the monied capital and shares of capital stock of national banks by authorizing the taxing of the same at a greater rate than is assessed upon such other monied capital coming into actual and direct competition in substantial amounts with the business of plaintiff and the other national banks in Belmont county, Ohio."

"Wherefore plaintiff prays that all said pretended taxes levied and assessed against the plaintiff for the years aforesaid be declared, adjudged and decreed to be discriminatory, invalid, illegal and void; that any purported lien upon the property of plaintiff by reason thereof or arising therefrom be decreed to be void and of no effect; that defendants and their respective successors in office be enjoined from collecting or attempt-

ing to collect from plaintiff the said taxes levied and assessed during the years 1928, 1929 and 1930; that pending the determination of this action a temporary restraining order be issued forbidding any action upon the part of defendants in collecting said taxes or assessing any penalties for the failure to pay said taxes and that upon final hearing said restraining order be made permanent and that plaintiff have such other and further relief as is proper."

"Plaintiff further prays that the defendant treasurer of said county be required and ordered to return to plaintiff the amount of taxes so paid by it under protest and mistake of law and facts, to wit, the sum of $6,575.30 paid in the year 1927 for the year 1926 and the sum of $7,294.08 paid in the year 1928 for the year 1927, for which separate amounts plaintiff prays judgment against said defendant treasurer of said county."

The foregoing paragraphs designated (b) and (c) relate to the averment that "the monied capital of building and loan companies and associations in Belmont county came into actual and direct competition with the business of plaintiff and the other national banks in Belmont county, Ohio, and such competition during each of said years was substantial in amount and as hereinafter set forth in part, to wit:" Then follows a detailed comparison of appellant, all national banks and all building and loan associations in Belmont county, with respect to the total of monied capital in each represented by: (a) capital, surplus and undivided profits, (b) deposits, (c) loans upon the security of real estate, and (d) loans upon the security of collateral; but there is absent any suggestion that one of the mentioned financial institutions exists in the taxing district in which appellant bank is located. Evidence in support of either competition or discrimination was not tendered and the claims of appellant with respect thereto were abandoned (R., 35, 189, 192-193), as conceded in its Statement of Jurisdiction, (p. 12).

Paragraph 8 of the third amended petition (R., p. 11) also contains a recital of developments in plaintiff's status after three original actions later consolidated were filed, whereby, not being licensed to resume normal banking operations after the national bank holiday March 5, 1933, a conservator was appointed pursuant to the provisions of the Bank Conservation Act (Title XII, U. S. C., Section 202 et seq., passed March 9, 1933) and had custody of the bank's assets while its reorganization, effective one year later, was in progress. Also recited is the plan of reorganization, pursuant to agreements between stockholders, depositors and other creditors (excepting, however, all parties interested in the taxes involved in litigation), the old banking association and a new one formed, whereby certain assets of the old bank, denominated acceptable, including a stipulated percentage of each deposit, were acquired by the new bank and all other assets of the old bank, denominated "unacceptable," were transferred to designated trustees for the purpose of liquidation in behalf of creditors whose claims were not assumed by the new bank.

The anticipated loss, however, did not occur. On the contrary it was admitted on the trial (R., p. 172) that all creditors except Belmont county were paid in full and that an amount sufficient to pay the taxes in controversy remains in the custody of the liquidating trustees (R., 102, 103). For this reason, this issue also passed out of the case before it reached Ohio reviewing courts.

As indicated in the prayer, recovery of taxes for the years 1926 and 1927 was sought in the second cause of action, wherein the allegations of the first cause were adopted and wherein appellant further alleged that it paid under protest and under mistake of law and fact "taxes pretended to have been levied and assessed—upon its capital, surplus and undivided profits after deducting therefrom the

value of its real estate". On this issue the judgment went against appellant in both lower courts (R., pp. 37, 52) and, as conceded by appellant (Statement of Jurisdiction, p. 12) it was not before the Supreme Court of Ohio in consequence of appellant's omission to prosecute a cross-appeal (*Howk* v. *Krotzer*, 140 O. S. 100).

The second cause of action and the final adjudication against appellant upon it are of significance in another respect. As stated in the Ohio court's opinion (142 O. S., 6, 10) one of the defenses was that "there has been an established practice during these years of so recording the assessments in the name of the bank rather than the individual owners", which appellant had paid "from 1912 to 1928, without protest". Appellant asserted in the second cause of action that taxes for the years 1926 and 1927 were assessed and entered upon the duplicates in the same manner as the taxes in controversy.

The anomaly apparent in the third amended petition of alleging discrimination in the assessment as between banks and other financial institutions, which could exist only if the assailed taxes were imposed upon appellant's shares, and alleging that the taxes were imposed upon the bank's capital, resulted from developments in litigation, the pleadings in which were the pattern for the initial petition (R., pp. 189-193) of banks (12 national, one state) in Belmont County, including appellant. As in *Hoenig, Treas.*, v. *Huntington National Bank*, 59 Fed. (2d), 479 (reversing 45 Fed. (2d) 213, certiorari to which was denied (287 U. S., 648), the alleged invalidity of the taxes, conceded to be on the shares, was due solely to asserted discrimination as compared to money invested in institutions other than banks (R., pp. 189-201), of which only shareholders could complain. The Court of Appeals, Sixth Circuit, having held that competition violative of paramount federal law, between national banks, state banks, building and loan

associations or other financial institutions in Ohio, could not exist, the sole ground of the discrimination originally asserted was cut from under the actions. Accordingly, appellant eliminated from its three amended petitions (DX G, R., p. 225; DX H, R., p. 236; DX I, R., p. 247) the allegation that it "has acted and is acting as the agent of its several stockholders in the payment of the taxes complained against", the allegation that "this suit is prosecuted by this plaintiff on its own behalf and for and on behalf of its stockholders", the allegation that the taxes were "assessed against the shareholders of this plaintiff by virtue of their ownership of such shares but in a lump sum to be paid by it", and the representation that the taxes were "levied and assessed against the shares of this plaintiff". Grossly inconsistent therewith, it asserted in the third amended petition that the property of the bank, and not the shares of the stockholders, were the subject of the assessment.

IV.

No Substantial Federal Question Is Tendered by This Appeal. The Asserted Right Denied Is Not Real.

The record in this case clearly shows that appellant's case centralizes upon the contention that the taxes in controversy are imposed upon the bank's property, contrary to the pronouncements of this Court in (1899) *Owensboro National Bank* v. *Owensboro,* 173 U. S. 664, and (1922) *First National Bank of Gulfport* v. *Adams,* 258 U. S. 363, because, so appellant insists, (1) the bank's capital, surplus and undivided profits were a factor in determining the amount of the taxes, and (2) the assessment was entered on the tax duplicates collectively opposite the name of the bank, instead of distributively in the names of the several shareholders. In (1923) *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 105, this Court determined

that "the fact that the capital, surplus and undivided earnings are made the measure of the value of the shares" does not give even "color to the contention", and by the judgment of which review is sought it was determined that omission to apportion the amount of the taxes among the several shareholders and to so enter the same upon the tax rolls did not convert a valid assessment of the shares into an invalid assessment of the bank's property. In so holding the Ohio Supreme Court relied upon *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, decided in 1897, prior to the enactment of Sections 5672 and 5673 of the Ohio General Code (102 Ohio Laws, 91) in the form applicable to the instant controversy. As declared in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 510, a purpose to tax a bank as distinguished from its shares "against common justice and of doubtful constitutionality ought not to be attributed to the law if any other fair construction is possible".

The purpose of the federal statute as well as its history convincingly disclose the error in assuming that the act of Congress prescribes the method by which the authorized taxes should be assessed, the manner in which they should be entered upon the tax records and the means by which they should be collected. That it did not do, and was not intended to do, either of these things is apparent from the provisions of the act itself and from the cases construing it.

"A consideration of the course of judicial decision on Rev. Stat. Sec. 5219 and its predecessors can leave no doubt that the various restrictions it (Congress) placed on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class", and the judicial decisions interpreting them evince "the same purpose to prevent actual discrimination but to allow the

states considerable freedom in working out an equitable tax system." *Tradesman National Bank* v. *Oklahoma Tax Com.*, 309 U. S. 560.

The genesis of Title 12, U. S. C., Section 548, as amended by the act of March 25, 1926 (44 Stat. at L., 223, c. 88), authorizing state taxation of national banks was Section 41 of the act of June 3, 1864 (13 U. S. Stat. at L., 99, 112), which became Section 5219 of the Revised Statutes. The initial provision of the statute is that "the Legislature of each state may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits." Its concluding provision that "Section 5219 of the Revised Statutes of the United States as in force prior to March 25, 1926, shall not prevent the legalizing by the states of any tax heretofore paid, levied, or assessed upon the shares of national banks, or the collection thereof, to the extent that such tax would be valid under said section" strongly indicates an intention to facilitate both assessment and collection of taxes on shares.

Assessment at the source having been made possible by Section 40 of the Act of June 3, 1864 (13 U. S. St. at L., 99), which became R. S. 5210 and Section 62, Title 12, U. S. C., this Court held, in *First National Bank* v. *Kentucky*, 76 U. S. (9 Wall.), 353, 363, that Congress "did not intend to prescribe to the states the method in which the tax should be collected." In *Tappan* v. *Merchants National Bank*, 86 U. S. (19 Wall.), 490, 505, it was declared that "uniformity in the assessment is all that it (the Federal Constitution) demands" and that "when assessed, the tax may be collected in the manner the (state) law shall provide, and this may be varied to suit the necessities of each case." In *Davenport National Bank* v. *Board of Equalization*, 123 U. S., 83, 85, the Court concluded that "the manner of assessing and collecting all taxes by the states is uncontrolled

by the act of Congress," and in *First National Bank* v. *Chehalis County*, 166 U. S., 440, 444, held that a state statute which requires assessment of shares collectively to the bank, is not repugnant to any Federal restriction.

As was declared in *Covington* v. *First National Bank*, 198 U. S., 100, at 112, "Section 5219, Rev. Stat., authorizes the state to tax all the shares of a national banking association, including those owned by nonresidents, as well as those owned in the state, in the city or town where the bank located; * * *. And this statute is express authority to the state by appropriate legislation to make the bank the agent of the shareholders for the purpose of returning the shares and paying the taxes thereon." By the 1923 amendment of R. S. 5219 (42 Stat. at L., 1499), expressly requiring, that the bank "shall make return of such shares and pay the tax thereon as agent of nonresident shareholders," Congress not only removed all lurking doubt whether the state could lawfully impose on a bank the obligation to return the shares for taxation and to pay the taxes thereon with respect to shares held by nonresidents but also sanctioned, if it did not command, to the end of uniformity, and as an implied condition on the conferred power of "taxing all the shares", (Compare: *Baltimore National Bank* v. *State Tax Commission*, 297 U. S., 209), that the state require the bank to serve as the agent of all shareholders with respect to both assessment and payment of the taxes due. Otherwise the purpose of the Constitution of Ohio and of both the Federal Constitution and statute to prohibit discrimination (*Tradesman National Bank* v. *Oklahoma Tax Commission, supra*) would be frustrated. A similar contemplation of collective assessment at the source and a like intent not to permit evasion are manifest in the 1926 amendment (44 U. S. Stat. at L., 223).

Property need not be assessed to any person or in any name. Taxation being more concerned with control than with the refinements of title (*Corliss* v. *Bowers*, 281 U. S.

376) constitutional safeguards are not infringed if taxes are assessed "without any reference whatever to the name of the owner."

Ballard v. *Hunter*, 204 U. S. 241, 256;
New Orleans v. *Stempel*, 175 U. S. 309, 311;
Gager, Treas. v. *Prout*, 48 O. S. 89, 110.

The record in this case thus discloses that, all questions of discrimination having been eliminated prior to its consideration in the Supreme Court of Ohio, the only real question presented relates to the manner of assessment. As decisions of this Court proclaim, this is not a matter of substance and does not involve the validity of a state statute within the meaning of that term as defined in (1919) *Jett Bros. Distilling Company* v. *Carollton*, 252 U. S. 1, 6, and cases there cited. (Compare: *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 115).

The decisions of this Court "have long since established that an attack upon a tax assessment or levy, on the ground that it infringes a taxpayer's Federal rights, privileges or immunities, will not sustain an appeal under #237 (a) (citations omitted). It is not enough that an appellant could have launched his attack upon the validity of the statute itself as applied; if he has failed to do so we are without jurisdiction over the appeal. The Judicial Code was intended to restrict our obligatory appellate jurisdiction to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled." (1942) *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 650.

V.

The Judgment of Which Review Is Sought Is Not in Conflict with Any Pronouncement of This Court.

Unquestioned pronouncements of this Court are that if the shares of the bank are assessed and taxed as the prop-

erty of the shareholders, such tax is not upon the capital of the bank and does not unreasonably burden a Federal instrumentality, even though and notwithstanding: the bank is authorized but not required to pay the tax, (*First National Bank* v. *Chapman*, 173 U. S. 205, affirming 56 O. S. 310); or is positively required to pay the tax, (*Lionberger* v. *Rouse*, 76 U. S. (9 Wall.), 468); or is required to "collect and pay" the tax, (*Merchants, etc., National Bank* v. *Pennsylvania*, 167 U. S. 461); or is obliged to pay the tax primarily, absolutely or otherwise. (*First National Bank* v. *Kentucky*, 76 U. S. (9 Wall.), 353; *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103.)

Conceding that *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, is directly contrary to their contentions, appellant misplaces confidence in *First National Bank of Gulfport* v. *Adams*, 258 U. S. 362, as overruling or at least modifying the earlier case. It does neither.

Unlike the case at bar, wherein each assessment is directly responsive to the return of the banks for the current tax year and is clearly identified as being upon shares, the assessment in the Gulfport case was additional to taxes paid on returns for prior years and was based upon an order of court directing the taxing authority (whose first judgment vacating the assessment had been reversed, 108 Miss. 346, 66 So. 407), to "assess the * * * bank with capital stock, surplus, undivided profits, and any and all property assessable to said bank, in the sum of $75,150 * * *, which said property was at said time owned by said First National Bank, and which had escaped taxation for each of the years as hereinbefore set out" (258 U. S. 362, at 364). This order of court obviously followed the reversal in 116 Miss. 450, 77 So. 195, of a judgment for the

bank, which had been determined by the lower court's finding "that the tax is imposed against it upon its capital stock as such, which the state is without power to do." The Supreme Court of Mississippi affirmed such order in the third appeal of the case (— Miss. —— 84 So. 707), notwithstanding the finding of the lower court, and refused to modify its approval on suggestion of error (123 Miss. 279, 85 So. 308).

Confronted with an additional assessment to the bank, "of all other personal property not otherwise mentioned," not based upon any return of the bank but ordered by the lower state court and approved by the state Supreme Court as not in conflict with Section 5219, Revised Statutes of the United States, notwithstanding the provisions of the state statute (abstracted 108 Miss. 346, 66 So. 407), this Court determined only that an assessment not purporting to be made in accordance with the state statute violated requirement of the paramount act of Congress in the form effective before its amendment in 1923 (42 Stat. at L., 1499, Ch. 267). The judgment of the court below was reversed and, so as to permit reassessment or other process in accordance with state statutes, was "remanded for further proceedings not inconsistent with this opinion." That the pronouncement of this case does not conflict in any respect with that announced in *First National Bank of Aberdeen* v. *Chehalis County*, 166 U. S. 440, witness the reliance upon both cases in *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, at 112.

In deciding the latter case, Mr. Justice Van Devanter was conscious that "several important changes" in Section 5219, U. S. R. S., were made by the amendatory Act of March 4, 1923 (42 Stat. at L., 1499, Chap. 267). One of these changes was the elimination of the provision that

"nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located." Mistaken interpretation of this proviso as requiring separate entry of proportionate share-taxes on tax records in the name of each shareholder may have induced some states to so prescribe, but more likely they were impelled by advantages accruing to the shareholders from a distributive entry in consequence of allowable deductions to individuals not available otherwise. More important, however, is the fact that in no instance, since *First National Bank of Aberdeen* v. *Chehalis County, supra,* was decided (1897) has this court reversed or modified any judgment announcing that an entry on tax records, opposite the name of a national bank, of ad valorem taxes assessed collectively on the shares of the bank, constitutes an assessment of taxes on shares of the bank's stockholders rather than upon any property of the bank.

Conclusion.

Treating the papers in this case as an application for a writ of certiorari, the appellant does not make any stronger claim to the exercise of this court's jurisdiction. None of the statutes involved are either doubtful or obscure and every contention made by appellant has been considered and denied by decisions of this court. Assuming, therefore, that a Federal question is presented by the record, it is so lacking in substance as not to warrant the court in exercising jurisdiction under section 344 (b), Title 12, United States Code.

As heretofore stated, the Supreme Court of Ohio construed state statutes as not violative of section 548, title

12, United States Code and upheld the validity of the taxes, as did the Circuit Court of Appeals, Sixth Circuit, in (1942) *Findley, Treas.* v. *Odland, Receiver,* 127 Fed. (2d) 948. Regardless whether the questions arising under the state constitution or its statutes so presented were rightly or wrongly determined as conforming to the statutes of Ohio and its constitution, the decision of the state court is controlling here (*Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 105). As construed by the Ohio Supreme Court, the state statutes contemplate that only the bank's shares be assessed, and do not require that the taxes be entered on tax records distributively in the names of the shareholders. In this connection, the state court pointed to the provision of section 5409, Ohio General Code, which requires that the real estate of the bank be assessed separately "in like manner as the real estate of persons is taxed", and had under consideration the certificate of the county official required by sections 5411 and 5412, Ohio General Code to assess the shares of banks "in the aggregate", that "I have fixed the value of the shares of" appellant, appearing on the report of its resources and liabilities (R., p. 210). Appellant agrees that this "annual report of resources and liabilities" (R. 210), on which were based the taxes in controversy, contained the names of the shareholders and the number of shares owned by each; and by sections 5393 and 5591, General Code of Ohio, this report is required to be filed and is made a public record, open to public inspection, so notice to third persons, to the shareholders and to the bank alike is accomplished. Neither this court nor the Supreme Court of Ohio has observed any provision of the Federal Constitution or statutes prescribing the particular manner of registering assessments on tax rolls for which appellant contends, or any other, as indispensable to the validity of taxes on bank shares, so

no right, privilege or immunity vouchsafed by the jurisdiction of this court has been denied.

Respectfully submitted,

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No. 422. First National Bank *v.* Findley, County Treasurer, et al. Appeals from the Supreme Court of Ohio. December 6, 1943. *Per Curiam:* The judgments

are affirmed on the authority of *Aberdeen Bank* v. *Chehalis County*, 166 U. S. 440, 443–6; *Citizens National Bank* v. *Kentucky*, 217 U. S. 443, 451; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 110–12; and *Colorado National Bank* v. *Bedford*, 310 U. S. 41, 52–3. *Mr. George Thornburg* for appellants. *Messrs. Ross Michener, A. G. Lancione,* and *C. C. Sedgwick* for appellees. Reported below: 142 Ohio St. 6, 50 N. E. 2d 157.